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IN THE
Supreme Court of the United States

October Term, 1953

NO. 00

JOSEPH GARNER and A. JOSEPH GARNER,
trading as **CENTRAL STORAGE & TRANSFER**
COMPANY,

Petitioners

v.

TEAMSTERS, CHAUFFEURS and HELPERS,
LOCAL UNION No. 776 (A.F.L.), ED LONG,
President, **ALLEN KLINE,** Business Manager, its
other officers and agents,

BRIEF FOR PETITIONERS

On Writ of Certiorari to the Supreme Court of
Pennsylvania

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Commerce Building
Harrisburg, Pa.

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Opinions Below

**IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1963
No. 56**

**Joseph Garner and A. Joseph Garner, trading as
Central Storage & Transfer Company,
*Petitioners***

v.

**Teamsters, Chauffeurs and Helpers, Local Union No.
776 (A.F.L.), Ed Long, President, Allen Kline,
Business Manager, its other officers and agents,**

**On writ of Certiorari to the Supreme Court of
Pennsylvania**

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the trial court, the Court of Common Pleas of Dauphin County, Pennsylvania, is reported in 62 Dauphin County Reporter 339-366. The opinion of the Supreme Court of Pennsylvania is reported in 373 Pa. 19-30 and at pages 30-34, the dissenting opinion.

Jurisdiction
JURISDICTION

The jurisdiction of this court is invoked under Title 28, United States Code, section 1257 (3), Act of June 25, 1948, c. 646, 62 Stat. 929, sometimes referred to as the Judicial Code of 1948. The petition for a writ of certiorari was granted on June 15, 1953, _____

QUESTION PRESENTED

Does the Labor Management Relations Act, 1947, oust the jurisdiction of a state court to enjoin picketing for the purpose of coercing an employer to compel its employees to become members of the picketing union, where the injunction was based upon state legislation which made that purpose unlawful?

STATUTE INVOLVED

The statute involved is the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. Supp. V, sections 141, et seq., 29 U.S.C.A. pocket part, sections 141, et seq. The complete text of the Labor Management Relations Act, 1947, is also set forth at pages 1 to 30 in Volume 1 of the Legislative History of the Labor Management Relations Act, 1947 (United States Printing Office, Washington, 1948), published by the National [Labor] Relations Board. In the second volume of that Legislative History of the Labor Management Act, 1947, pages 1661 to 1690, there is set forth a convenient comparison of the National Labor Relations Act of 1935 with Title I of the Labor Management Relations Act of 1947. Pertinent provisions, quoted from the United States Statutes at Large, include the following:

Statute Involved *

Findings and Policies

"Section 1. * * *

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full

Statute Involved

freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

"Rights of Employees

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"Unfair Labor Practices

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

Statute Involved

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in sections 7: * * *

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of sub-section (a) (3) * * *

"Prevention of Unfair Labor Practices

"Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

STATEMENT

On June 9, 1949, Central (as we refer for convenience to petitioners, who are partners trading as Central Storage & Transfer Company) filed a complaint in a state county court of common pleas at Harrisburg, Pennsylvania, against the Teamsters (Teamsters, Chauffeurs and Helpers Local Union No. 716, A.F.L., and its president and business manager) requesting an injunction against picketing allegedly intended or calculated to coerce Central to compel or require its employees to become members of that union (R. 1, 4-7). On June 13, Teamsters filed an answer and motion to dismiss (R. 1, 8-12), likewise making no reference to the Labor Management Relations Act. On June 17, after hearing testimony offered by both Central and Teamsters (R. 1, 13-101), the state court decreed that a preliminary injunction should issue (R. 102) against picketing "clearly intended and calculated to coerce the plaintiffs (Central) into a violation of law by requiring them to force their employees, a majority of whom are not members of any labor organization and with whom they have no labor dispute, to join the defendant union (Teamsters) * * *". Subsequently additional testimony was taken on final hearing (R. 111-166), tried together with a companion proceeding by George W. Weaver & Son, Inc., against the Teamsters presenting similar issues which it was stipulated would be determined by the final decision in the Central proceeding (R. 168). On September 4,

Statement

1951, the court filed forty findings of fact (R. 171-179), accompanied by an elaborate discussion (R. 179-200) and entered a decree nisi under Pennsylvania practice followed by a final decree of March 3, 1952 (R. 228), accompanied by an opinion (R. 221-227) overruling some fifty-nine exceptions filed by the Teamsters to the decree nisi (R. 203-221) making permanent the injunction against picketing (R. 179, Finding of Fact 40, R. 224):

"* * * deliberately designed to coerce Central, by causing it substantial business losses, to compel or require its employees to become members of the (Teamsters) Union."

The jurisdiction of the state court was seasonably challenged by the Teamsters by exceptions of September 14, 1951 (R. 203-221) to the decree nisi. By exception No. 43 (R. 216) for example the Teamsters contended that:

"Congress * * * pre-empted jurisdiction over the subject-matter of these proceedings * * * by the Labor-Management Relations Act * * *"

The Teamsters on March 19, 1952 (R. 229) to the Supreme Court of Pennsylvania. On February 13, 1953, the Supreme Court of Pennsylvania reversed the decree (R. 229, 238), dismissed the complaint for want of jurisdiction and held (R. 238) that:

"Plaintiffs' remedy must be sought by them (Central) in proceedings before the National Labor Relations Board, where an injunctive remedy, as previously pointed out, is available."

The Supreme Court of Pennsylvania recognized that, under the facts found by the trial court, such picketing would have been, by the law of Pennsylvania, for an unlawful purpose (R. 231, R. 232),

“ * * * because aimed to coerce the employer into committing what the [Pennsylvania] act does declare to be an unfair labor practice * * * ”

The findings of the trial court, as summarized in part in the opinion of the Pennsylvania Supreme Court (R. 171-179, R. 230-231) were as follows: In the conduct of its trucking business at Harrisburg, Pennsylvania, with principal office at 11th and State Streets, Central utilizes a platform at 9th and Market Streets at the rear of the Reading Railroad freight station in its performance of local freight pickup and delivery service for The Reading Railroad Company, and its trucking division, The Reading Transportation Company, as well as some fifteen other trucking firms (R. 171). Some of the freight thus delivered to consignees in Harrisburg from that Reading platform in Harrisburg is interstate, originating at points outside of Pennsylvania on the lines of the Reading Railroad (R. 171-172). Central employs twenty-four persons as truckers, helpers and platform men (R. 172).

The Teamsters, Harrisburg Local, has approximately four hundred members (R. 115, 172) engaged as truck drivers and helpers. This Teamsters, Chauffeurs and Helpers, Local Union No. 776 (A.F.L.), at Harrisburg, is a branch of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, affiliated with the American

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Federation of Labor, organized with comparable locals in other communities, including York, Lancaster and Reading, in the immediate neighborhood of Harrisburg (R. 172, R. 173). The Teamsters had organized most of the over-the-road carriers serving Harrisburg (R. 178) but had been unsuccessful in enrolling in its membership the truck drivers, helpers or warehousemen employed by a number of local Harrisburg dray and freight carriers (R. 173-174) such as Central, Hill Express, Merchants Delivery, Montgomery & Company and George W. Weaver. Central never objected, and does not presently object, to any of its employees joining Teamsters (R. 173). Teamsters had enrolled in its membership, after approximately fifteen years of effort, only four employees of Central (R. 172, R. 173). On June 7, 1949, rotating pickets, two at a time, were placed by Teamsters, one in front of, and the other at the entrance to, the Reading platform utilized by Central; none of the pickets were employees of Central (R. 174). The pickets carried signs bearing the following legend:

"Local 776 Teamsters Union (A.F. of L.) wants Employees of Central Storage & Transfer Co. to join them to gain union wages, hours and working conditions."

Neither then nor at any other time (R. 172, R. 175—wages above union scale, R. 173) has there been any controversy or labor dispute between Central and its employees, none of whom were on strike. This picketing was conducted at all times in an orderly and peaceful manner (R. 174).

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While the picketing continued Teamster truck drivers and helpers employed by The Reading Transportation Company and other over-the-road motor carriers refused to cross the picket line (R. 176). As the bulk of Central's operation was with unionized trucking concerns, the consequence was that Central's local business fell off 95%, causing a loss to it of between \$400 and \$500 per day (R. 176, R. 178).¹

We have also a finding of fact by the state court as to the purpose of the picketing. The state court found (R. 179a, R. 224a-225a) that the picketing was

"* * * deliberately designed to coerce Central by causing it substantial business losses, to compel or require its employees to become members of the (Teamsters) Union."

¹ The findings thus summarized had a reasonable basis in the evidence: Finding No. 1, R. 16 and 19-20; No. 2, R. 21 and 26; No. 3, R. 21 and 22; No. 4, R. 23; No. 5, R. 22, 23 and 36-37; No. 6, R. 16, 72 and 89; No. 7, R. 51, 72 and 115; No. 8, R. 16, 20, 124 and 151; No. 9, R. 17, 20 and 50; No. 10, R. 40, 64 and 150; No. 11, R. 25, 40 and 64; No. 12, R. 25 and 40; No. 14, R. 39-40; No. 15, R. 93, 94, 97-98 and 99-101; No. 16, R. 18 and 21; No. 17, R. 21 and 29; No. 18, R. 17; No. 24, R. 23, 27-32, 36, 44, 47, 50, 51, 53, 55, 56; No. 25, R. 23, 27; No. 34, R. 28, 44, 48, 53, 55 and 57. While the Supreme Court must have the ultimate power to re-examine findings when necessary to ascertain whether a finding denying a federal right is unsupported by evidence, in its justified search of the record the Supreme Court will not disturb the findings of fact of the state court unless ascertained to be without support in the evidence, including any reasonable inference that may be drawn from it: *Milk Wagon Drivers Union, etc. v. Meadow-Moor Dairies, Inc.*, 312 U.S. 287, 293, 294; *Local Union No. 10, etc. v. Graham, et al.*, — U.S. —, 73 S. Ct. 585, 588, and note 4.

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Some of the supporting evidence is summarized in Appendix A.

As in *Local Union No. 10, etc. v. Graham, et al.*,
—— U.S. ———, 73 S. Ct. 585, 589,

"The effect of the picketing was confirmatory of its purpose as found by the trial court."

The picketing was done at such a place and in such a manner that, coupled with established union policies and traditions, it caused the union drivers of the over-the-road carriers transporting freight to and from Harrisburg to stop doing business with Central; it thus paralyzed the local terminal pickup and delivery service in Harrisburg which was utterly dependent upon over-the-road truck transportation by such unionized truck lines. It was part of a sudden knock-out campaign, after slow years of continuous unsuccessful effort by Teamsters, to force into that union all the drivers of local Harrisburg draymen by organizing (see Appendix B) from the top.

Based upon the findings of the trial court we have a case here, as in *Local Union No. 10, etc. v. Graham, et al.*, —— U.S. ——, 73 S. Ct. 585, 589, in which picketing was undertaken and carried on with at least one of its substantial purposes in conflict with declared state policy. As pointed out by the Supreme Court of Pennsylvania (R. 232a)

"* * * the Federal act would stamp this picketing as an unfair labor practice, whereas the State act does not so list it but our courts have declared it to be unlawful because aimed to coerce

the employer to committing what the act does declare to be an unfair labor practice on his part.

"The problem presented, therefore, is whether, under such circumstances, the Labor Management Relations Act constituted an absolute and complete preemption of the field so as to preclude State action, and the test of decision is the intention of Congress • • •"

SPECIFICATION OF ERRORS

The Supreme Court of Pennsylvania erred:

1. In holding that the Court of Common Pleas of Dauphin County was without jurisdiction to issue an injunction under state law against picketing for the unlawful purpose of coercing the employer to compel its employees to become members of the picketing labor organization.

2. In holding that the Labor Management Relations Act, 1947, conferred exclusive jurisdiction upon the National Labor Relations Board.

3. In reversing the final decree of the trial court.

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SUMMARY OF ARGUMENT

Holding that Section 10 (a) of the Labor Management Relations Act of 1947 superseded state court jurisdiction to adjudicate private rights under valid state law, the Supreme Court of Pennsylvania reversed a permanent injunction against picketing for the purpose of coercing an employer to compel its employees to join the picketing union. Under state law that purpose was unlawful and the concerted activity harming the employer was a tort transgressing the employer's private rights. At the same time Section 8(b)(2) empowered the National Labor Relations Board to prevent the same conduct for the public purpose of protecting the free flow of interstate commerce.

Solution of this far-reaching problem of accommodation between state judicial and national legislative jurisdiction calls for careful analysis of four questions of construction of the Labor Management Relations Act presented in the following order. Did Congress (I) *withhold consent*, (II) *enter the field*, (III) *occupy the field* or (IV) *promulgate contrary policy*? Negative answers severally call for reversal in this case.

CONSENT

I. The Congress intended and consented that such state court jurisdiction continue. Section 10 (a), in the light of legislative history of the Labor Manage-

ment Relations Act, expressed that intent and consent of Congress when it added its equalizing amendments as a maximum ceiling in the national interest—the sky was no longer the limit—for certain nationally conspicuous unfair labor practices by labor organizations. Congress abhorred a vacuum. Congress realized only too keenly the limits of effective federal action. In Section 10 (a) Congress expressed its consent in four ways:

A. In the second sentence of Section 10 (a), Congress recognized “any other means” of adjustment or prevention, subject only to the paramount authority of the National Labor Relations Board. The Conference Committee Report shows that this meant that remedies before the courts were continued and that private remedies were consented to. The debates show that so-called duplication of remedies, urged as an objection to equalizing amendment, was deliberately desired and intended. As Senator Taft stated:

“There is no reason in the world why there should not be two remedies * * *”

B. By the first sentence of Section 10 (a) the Board was “empowered to prevent” unfair practices in the public interest under the Brandeis construction in *Klesner* of similar language in the Federal Trade Commission Act on which this legislation was purposely patterned and, as *National Licorice* confirms, the field of private rights was not entered.

C. Following the first two sentences of Section 10 (a), the clarifying proviso, unanimously

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introduced by the Senate Committee ten days after the *Bethlehem* case at the instance of the New York State Labor Relations Board (to harmonize its existing practice and understanding with the National Labor Relations Board with overtones in the opinion) by its nature, purpose and language, for ceding or conceding by agreement with a state agency of jurisdiction on an industry-wide basis over representation as well as unfair labor practice cases subject to a limitation limited to state statute, in its very delimiting detail, recognized the continuing jurisdiction of state courts under consistent state law, common law as well as statute law. Congress never dreamed of a wholly unnecessary ceding to state courts of a jurisdiction to adjudicate private rights which Congress had not so much as delegated to the National Labor Relations Board itself.

D. From Section 10 (a) Congress deleted the word "exclusive" theretofore descriptive of the Board's jurisdiction, such as it was, as it refashioned that section in cautious harmony with its deliberate intention, made plain in the debates and in the Conference Report, in adding equalizing national public remedies not displacing the unreplaced and irreplaceable state judicial jurisdiction.

NO ENTRY

II. Congress, in addition to expressing in Section 10(a) its consent, has not entered any of the multitudinous, varied fields of state court jurisdiction of

private rights. Congress delegated to the National Labor Relations Board, as to the Federal Trade Commission under prior similar statutory language intentionally followed, no jurisdiction to adjudicate private rights, as cases such as *Klesner* and the second *Consolidated Edison* cases have demonstrated. Indeed it is for this very reason, i.e., that Congress created new public rights appropriately implemented by a discretionary public remedy, that the state courts, and indeed the federal district courts, as *Gerry of California* and *Amazon* have decisively decided, have no implied jurisdiction to enforce such public rights. That situation presents an entirely different question from the present problem of state court jurisdiction under state law, as California itself has recently made clear in *Sommer*, expressly distinguishing *Gerry of California*. With *Sommer*, the great weight of authority (Pennsylvania standing here almost alone) sustains state court jurisdiction under valid state law to adjudicate private rights. Congress has not considered the perplexing problems as to where the lines would be drawn, as they would have to be, if there were some supersedure of state court jurisdiction. Congress has not entered such fields. This follows a fortiori from *Allen-Bradley*, *Wisconsin Auto Workers*, and *Algoma*, where the states remained free—even through state-labor relations boards exercising a wide discretionary administrative authority in fashioning public remedies—to proscribe wrongs between employer and employee which Congress had not outlawed or pre-empted when it limited the jurisdiction of the National Labor Relations Board to a ceiling on unfair labor practices as listed in Section 8 of the National Labor Relations Act

of 1935 or the Labor Management Relations Act of 1947.

NO OCCUPATION

III. Where, going further, Congress had entered the field, in *Consolidated Edison*, *Bethlehem*, *La Crosse* and *Plankinton*, there remained, as *Zook* shows so strikingly, the question how far Congress had occupied that field with resultant exclusion of state power. *Bethlehem*, reaffirmed in *La Crosse* and applied in *Plankinton*, recognized in its pertinent classification of cases the various degrees of effective congressional possession of a field once entered and found that real potentials of conflict, created by somewhat conflicting standards, by the broad discretion in policy making and fashioning of remedies and by the impact of informal administrative practice, precluded any intrusion by a state labor relations board in the china shop of the National Labor Relations Board. No such potentials of conflict exist in the case of state courts confined to the molecular activity of applying rules of law in adjudicating rights between private parties in a case or controversy. The functioning of state courts in the administration of justice is of such fundamental importance in our democratic form of government under law that Congress does not lightly interfere therewith. Indeed, it is inconceivable that Congress could pass uniform national legislation capable of adjustment and application to the adjudication of the myriad private rights incident under such varying circumstances to labor or management activities that take place in the forty-eight states. Here a case-by-case determination of federal supremacy is permissible and, in the wisdom

of Congress, mandatory. In the unlikely event of conflict in remedies the power of the National Labor Relations Board is paramount and would, of course be recognized by the judges in the states. The National Labor Relations Board, which can adequately protect its paramount power in the unlikely event of conflict, has not acted in this case and no real potentials of conflict preclude a case-by-case test of federal supremacy, even if this field traditionally cultivated by state courts had been entered by Congress.

NO CONTRARY POLICY

IV. While Congress has chosen to circumscribe its regulation, and a state court is outside that limited field in adjudicating private rights, nevertheless the state court cannot apply state law contrary to basic rights guaranteed by the Labor Management Relations Act. *Hill, O'Brien* and *Amalgamated* struck down state statutes that (1) frustrated the collective bargaining Congress authorized, and (2) regulated, or even abrogated the "freedom to strike" for the lawful purpose of "improvement of wages, hours and working conditions" that Senator Taft in an authoritative statement of Congressional intention said:

"We recognize * * *"

The public policy of Pennsylvania, however, is expressed in the section of its little Wagner Act identical with Section 7 of the National Labor Relations Act of 1935, implicitly recognizing, as construed by the Pennsylvania Supreme Court and the National Labor Relations Board the "right to refrain" codified by express language, as Senator Taft has explained, in the

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additional language expressly placed in Section 7 in the Labor Management Relations Act. The Pennsylvania statute, within the meaning of Article VI, is clearly not contrary, and no rights guaranteed by the Labor Management Relations Act were impaired. One of the fundamental objectives of the Labor Management Relations Act is to encourage collective bargaining between employers and unions representing free, uncoerced majorities of the employees, election procedure for selecting employees' representatives has been provided, and picketing to coerce employees, whether directly or through their employer as here, into a choice of representatives, violates a fundamental policy of the Labor Management Relations Act and is not designated by Congress as a protected activity. Congress had no intention of warming up an immunity bath for organization from the top (see Appendix B), outlawed such coercive conduct in its Section 8(b) (2) equalizing amendment and, recognizing the limits of effective federal action, intended and consented that state courts continue to adjudicate private rights of an employer harmed by such tortious concerted activity.

Therefore, in this case, the state court had jurisdiction to adjudicate under valid state law, precious private rights preserved by Congress.

POINT I

CONGRESS EXPRESSED ITS INTENTION NOT TO SUPERSEDE STATE COURT JURISDICTION

When it added in Section 8(b) its outlawry of unfair labor practices which the National Labor Relations Board under Section 10(a) was empowered to prevent, Congress expressed its intention that state court jurisdiction continue under state law. The intention of Congress as to the effect its legislation under the Commerce Clause shall have in redefining the areas of local and national predominance is (R.232a) the test of decision: *California v. Zook*, 336 U.S. 725, 728-729, 740, 749;²

² In ten cases the Supreme court has considered some of the problems of construction prerequisite to a determination of the impact on various exercises of state power over labor relations of the National Labor Relations Act and the Labor Management Relations Act: *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 223-224, 245; *Allen-Bradley, Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 747, 748-749, 750, 751; *Hill v. Florida*, 325 U.S. 538, 542, 545, 559, 560; *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 775, 776, 778, 779; *La Crosse Telephone Corp. v. Wisconsin Labor Relations Board*, 336 U.S. 18, 20; *International Union, etc. v. Wisconsin Employment Relations Board*, 336 U.S. 245, 252, 263, 266-267, 270; *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 305, 306, 307, 326; *Plankinton Packing Co. v. Wisconsin Employment Relations Board*, 338 U.S. 953; *International Union, etc. v. O'Brien*, 339

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The very purpose of these equalizing amendments to the National Labor Relations Act of 1935 by the Labor Management Relations Act of 1947 to make pos-

U.S. 454, 457, 458; *Amalgamated, etc. v. Wisconsin Employment Relations Board*, 340 U.S. 383, 395-396, 398, 403, 405. These cases, on their facts and by their language have consistently drawn the line between federal and state power, in the light of such federal labor legislation, far short of pre-empting the jurisdiction of state courts to decide private rights under state law and recognize that the intention of Congress in this regard is controlling.

In determining whether Congress has entered the field in issue, the presumption is in favor of the state and the intention of Congress to exclude the state power that may be exercised in the absence of congressional action must be clearly manifested: *Missouri K. & T. R. Co. v. Haber*, 169 U.S. 613, 624 (liability in civil action for damages "a subject about which the animal industry act did not make any provision"); *Savage v. Jones*, 225 U.S. 501, 532 (in preventing falsity in statements when made, by the Pure Food and Drugs Act "Congress has * * * not included that at which Indiana aims" i.e., affirmative disclosure of ingredients); *Atchison, T. & S. F. Ry. Co. v. Railroad Commission*, 283 U.S. 380, 391-392 ("Congress had given to the Interstate Commerce Commission no power to require the building of such a union terminal as that projected"); *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749 ("Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board"); *International Union, etc. v. Wisconsin Employment Relations Board*, 336 U.S. 245, 254 ("the federal Board has no authority either to investigate, approve or forbid the union conduct in question"). The field in issue, which we have noted in connection with each of these illustrative cases, had not been entered by Congress under the familiar principle applied in each case that in cases of concurrent power over commerce state jurisdiction remains effective so long as Congress has not manifested an unambiguous purpose that it should be superseded. Once it is determined, however, that Congress has clearly entered the particular field in which a state asserts concurrent power, a second question arises as to the extent to which Congress has occupied that field, and

sible the "elimination" of "concerted activities which impair the interest of the public in the free flow of

on that second issue, as we read the cases, and as the Supreme Court may now be prepared to declare, the presumption is against state power: *McDermott v. Wisconsin*, 228 U.S. 115, 130, 133 ("branding upon the package . . . is the subject-matter of regulation . . . under the state law . . . labels . . . for the determination of the correctness of which Congress has provided efficient means, shall be removed . . . to permit such regulation . . . is . . . to destroy rights arising out of the Federal statute"); *Charleston & W. C. R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 603 ("policies of particular states upon the subject of the carrier's liability for loss or damage to interstate shipments . . . have been superseded." . . . It overlaps the Federal act in respect of the subject"); *Hines v. Davidowitz*, 312 U.S. 52, 61 ("subject of the state and federal laws is identical registration of aliens as a distinct group"); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 167-168 ("Congress undertook to regulate the production . . . once the material was definitely marked for commerce by acquisition of the manufacturer . . ."); *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 773-774, 775 (classifying the cases on degrees of occupancy of an entered field applicable where "both governments have laid hold of the same relationship for regulation . . . two administrative bodies are asserting a discretionary control over the same subject matter"); *La Crosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U.S. 18, 25 ("state and . . . federal statutes . . . laid hold of the same relationship and . . . provided different standards for its regulation"); although this presumption may be overcome in an area "imbued with the state's interest" as in *California v. Zook*, 336 U.S. 725, 732, where Mr. Justice Burton, with whom Mr. Justice Douglas and Mr. Justice Jackson joined, dissenting, clearly placed upon the state "the burden of overcoming the supremacy of the federal law in that field . . .", at page 749, which Congress had entered.

When Congress clearly expresses its intention, either way, it is unnecessary to invoke presumptions based upon experience, and the words of the statute or the legislative history are decisive, as in the unanimous decision in *Allen-Bradley Local No. 1111 v. Wisconsin*

* * * commerce" is declared in Section 1, 61 Stat. 136, 137, 29-U.S.C.A. pocket part, Section 151.*

As we turn to Section 10(a) of the Labor Management Relations Act and legislative history for evidence that Congress has clearly manifested an exclusion of the state judicial power here in issue, we find that it has not. On the contrary, Congress has expressed its intention, or consent, that state court jurisdiction continue to adjudicate under state law private rights in an area as imbued with the state's interest as this one. In Section 10(a) Congress has expressed its controlling intention in the two sentences and the proviso which now constitute Section 10(a) as well as by its deletion of the word "exclusive" which had appeared in the corresponding section of the National Labor Relations Act. The congressional intent therefore lends itself to a convenient fourfold exposition focused upon (A) "any other means" in the second sentence of Section 10(a), (B) "Board is empowered" in the first sentence, (C) "cede to such agencies in the clarifying proviso,

Employment Relations Board, 315 U.S. 740, 748-749 and footnote 7. See *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 307-310, 312, 326. So here the applicable presumption in favor of state jurisdiction is in harmony with the controlling clearly expressed intention of Congress found in Section 10(a) and the legislative history.

* Helpful over-all studies of this federal labor legislation and the various problems of pre-enption it presents include Cox and Seidman, *Federalism and Labor Relations*, 64 *Harvard Law Review*, 211-245, Smith, *The Taft-Hartley Act and State Jurisdiction over Labor Relations*, 46 *Michigan Law Review* 593-624, and Petro, *Participation by the States in the Enforcement and Development of National Labor Policy*, New York University Fifth Annual Conference on Labor, 1-76.

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and (D) the deletion of "exclusive," and in their alphabetical order we proceed to analyze these four expressions of congressional intention in the light of their legislative history.

A.**Any Other Means**

Congress in the second sentence of Section 10(a) of the Labor Management Relations Act explicitly recognized the existence of "other" remedies and thereby expressed its intention that the power of the National Labor Relations Board under Section 10 should not affect the availability to private persons of remedies they might have, in respect to the very same activities, before state courts under state law. The intention of Congress is expressed in its very broad reference to "any other means" and in the legislative history. In the House Conference Report No. 510 on H.R. 3020 of June 3, 1947, at pages 52 and 57, 93 Cong. Rec. 6376, 6377, conveniently reprinted in Legislative History of the Labor Management Relations Act, 1947, 556, 561, it is stated that:

"The conference agreement adopts the provisions of the Senate amendment. By retaining the language which provides the Board's powers under section 10 shall not be affected by other means of adjustments, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in

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lieu of, other remedies. * * * The conference agreement adopts the procedure of the Senate amendment. The power of the Board under this provision will not affect the availability to private persons of any other remedies they might have in respect to such activities."

Commenting on this legislative history, in *Amazon Cotton Mill Co. v. Textile Workers, etc.*, 167 F. 2d 183, 187, where it was held that a new private remedy by injunction contrary to the Norris-LaGuardia Act was not created in the federal district courts, the word "when" in the conference report implying pre-existence and not an act of creation, Circuit Judge Parker (referring to the third from last sentence as hereinabove quoted) said:

"The last sentence of the quotation does not mean, of course, that a general remedy in the courts was being given by the act, but merely that an option existed where a remedy in the courts was given by the act, or existed otherwise."

Here the remedy before the Pennsylvania state court "existed otherwise."

This important language, thus employed by the Congress to recognize other remedies before the courts that continued to be available to private parties, had been omitted in the House Bill as reported, as passed by the House and as explained in that same paragraph of the conference report: 93 Cong. Rec. 6376, Legislative History, etc., pages 36, 193, 556. The House Bill not only omitted that language but expressly made the power of the Board "exclusive". In that very different posture of the then much broader bill, when it used the

word "exclusive" and eliminated reference to "any other means", exactly the reverse of the law as finally enacted, House Report No. 245 of April 11, 1947, on H.R. 3020, Legislative History, etc., pages 330-331, referred to congressional repudiation, intended to bind the states, of foremen bargaining units and to the rule of exclusive jurisdiction developed by the Supreme Court.

The conference agreement, while in effect making exclusive in Section 14(a) certain provisions as to supervisors, rejected the broad sweep of the House Bill and its "exclusive" language, and on the contrary adopted the provisions of the Senate amendment expressly stating that the Board's powers under Section 10 should not be affected by any other means of adjustment, Congress thus making clear that Section 10 would not affect the availability to private persons of any remedies they might have in respect to such proscribed activities before state courts under state laws.

The explicit language in the second sentence of Section 10(a) recognizing other remedies gives effect to the intention of Congress not only as expressed in the conference report but also in significant Senate debate. Senator Taft, on the opening and the closing days of extended debate on the amendment that became Section 8(b) (1), 93 Cong. Rec. 4024, 4437, Legislative History, etc., pages 1031 and 1208, stated that:

"There is no reason in the world why there should not be two remedies * * * An injunction ought to be issued to prevent such a procedure. * * * The bill does not in any way change the right of the Federal court to issue an injunction. The

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Senator is suggesting that the enactment of this proposed legislation will bring about a condition which will compel the local court to do its duty. If that will be the result, I believe it will be a beneficial effect. * * * the measure may be duplicating the remedy existing under State law. But that, in my opinion, is no valid argument."

Opposition to the amendment rallied throughout, 93 Cong. Rec. 409, Legislative History, etc., 1021, compare 1031, around a statement made by the National Labor Relations Board that:

"... the enactment of this provision would make unions liable twice for the same offense, once under State and once under Federal law."

The opposition stressed cases of physical violence which were clearly illegal under the laws in every state. Senators Taft, Ball and Ellender pointed out that the amendment went far beyond physical violence, as did other committee amendments relating to secondary boycotts and jurisdictional strikes. Senator Taft (Legislative History, etc., at pages 1029, 1030 and 1032, 93 Cong. Rec. 4023, 4024, 4025) referred to coercion by threat of strike, as in the case of *Hall Freight Lines, Inc.*, 65 N.L.R.B. 397, to the economic pressure of picketing for organization from the top and to mass picketing, saying:

"Sometimes the union has not even gotten into the plant when they begin to coerce employees of the plant.

"We had a case last year where a union went to a plant in California and said, 'We want to

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organize your employees. Call them in and tell them to join our union.' The employer said, 'We have not any control over our employees. We cannot tell them, under the National Labor Relations Act.' They said, 'If you don't, we will picket your plant'; and they did picket it, and closed it down for a couple of months * * * the amendment * * * has been used in Wisconsin as a means not only of preventing the coercion of employees but also of attempting, bringing such action as can be brought by administrative law, to end mass picketing. Of course, if administrative law fails, it would be necessary finally to resort to the police powers of the States."

Senator Ellender (Legislative History, etc., at page 1056, 93 Cong. Rec. 4132) cited as another glaring example a secondary boycott in a California cannery case of 1946 where:

"While the election was pending, A.F.L. teamsters demanded a closed shop as the price of transporting produce from farm to cannery. * * * In order to curtail losses, the canneries were forced to enter into a contract with the A.F.L."

Senator Ball (93 Cong. Rec. 4017, Legislative History, etc., 1020) referred to an Oklahoma case in 1947 where:

"... a local judge * * * found the Teamsters * * * guilty of contempt of court for picketing an establishment although no members of the union were employed there, in an effort to coerce those who were employed there into joining a union which they did not want to join."

Senator Morse rejoined (93 Cong. Rec. 4430, *Legislative History*, etc., at page 1195) that:

"... the teamsters union was found guilty of contempt of court for picketing an establishment in an effort to coerce employees into joining the union. If such activity constitutes a violation of State law, as it apparently did in the case cited, there seems to be no occasion for adopting the amendment, and thus requiring the N.L.R.B. to correct the same abuse."

Senator Ball, on the closing day of debate on the amendment introduced by him with the support of Senator Taft and other members of the Committee, summarized the prevailing view that it would be well to encourage more state remedies and (93 Cong. Rec. 4432-4433, *Legislative History*, etc., at page 1200) said:

"So it may well be that many of the types of activities of unions which we are seeking to restrain somewhat by this mild amendment are the kind of activities which would be corrected by good local law enforcement. But I think we shall encourage that kind of local law enforcement if the Federal Government, acting through Congress states clearly its position that individual employees are entitled to their right of self-organization free from coercion from any source, whether it be the employer, the union, or some outside source."

In the closing argument in favor of the amendment, which was adopted, Senator Taft (93 Cong. Rec. 4437, *Legislative History*, etc., at page 1208) stated that:

"I wish to point out that the provisions agreed to by the committee covering unfair labor practices

on the part of labor unions also * * * may be duplicating the remedy existing under State law."

As set forth in Senate Report No. 105 on S. 1126, Supplemental Views of Senators Taft and Ball and other committee members, the views adopted by the Congress, at page 50, Legislative History, etc., page 456,

"The committee heard many instances of union coercion of employees * * * Some of these acts are illegal under State law, but we see no reason why this should not also constitute unfair labor practices to be investigated by the National Labor Relations Board, and at least deprive the violators of any protection furnished by the Wagner Act."

The intention that state remedies under state law continue, and indeed be encouraged by this federal legislation appears even from the course of argument concerning private injunctions in the federal district courts, as conveniently set forth in Legislative History, etc., pages 79-80, 206-207, 395, 387, 561, H.R. 3020 in Section 12 provided for injunctions at the request of private persons against boycotts and other described unlawful concerted activities in the federal district courts free from the restrictions of the Norris-La Guardia Act. Cases of Teamster boycotts and picketing to organize from the top as well as threats of violence were cited, Legislative History, etc., 658-659, 93 Cong. Rec. 3449-3450, were cited to show a need for such protection by federal law. The opposition had much to say for the Norris-La Guardia Act and against repealing, riddling or undermining it by reinstating, restoring and reviving the federal anti-labor injunction, Legislative History, etc., 638, 650, 655, 660, 664,

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689, 691, 707, 710, 720, 722, 724, 728, 791, 795-796, 802, 806, 814, 840, 856, 93 Cong. Rec. 3439, 3444, 3445, 3448, 3449, 3451, 3452, 3525, 3526, 3534, 3536, 3541, 3542, 3543, 3546, 3630, 3632, 3636, 3638, 3642, 3658, 3667. In the Senate, the sentiment in favor of the Norris-La Guardia Act and against the federal labor injunction was so much stronger that the committee blocked any such suggestion for private injunctions in the federal courts and in Senate Report No. 105 on S. 1126, Supplemental Views, pages 54 and 55, Legislative History, etc., 460-461, a minority of four senators, including Senators Taft and Ball, suggested such direct action only against secondary boycotts and jurisdictional strikes enjoining the entire strike without continuous supervision and contempt charges, saying:

"We do not desire to put the Federal courts into every strike, and therefore we do not propose injunctions against mass picketing or other features which may be alleged in any strike for better wages and working conditions."

When Senator Ball, without the joinder of Senator Taft (93 Cong. Rec. 4757, Legislative History, etc., 1323) offered an amendment to this effect, that amendment was decisively defeated after sharp debate (93 Cong. Rec. 4757-4770, 4834-4847, Legislative History, etc., at pages 1323 to 1370) summarized in Senator Taft's declaration (93 Cong. Rec. 4843, Legislative History, etc., at page 1365) that:

"I found that opposition to restoring the injunctive process even in cases of secondary boycotts and jurisdictional strikes * * * so strong.

Argument

* * * that I have determined that I shall vote against the Ball amendment * * *

In this debate as to amending the Norris-La Guardia Act to restore private injunctions in the federal courts no one questioned the continuing availability of state court injunctive relief under state law, as indicated in the following colloquy (93 Cong. Rec. 4838, Legislative History, etc., at page 1355):

"Mr. McClellan. Under the present law, what protection has a farmer, when a boycott interferes with the transportation of his products; which possibly are highly perishable?

"Mr. Ball. He has none, unless there is a State law which would protect him."

Senator Morse buttressed the arguments against restoring abuses of federal labor injunctions with a similar recognition of continuing state court jurisdiction under state law (93 Cong. Rec. 4840, Legislative History, etc., at page 1359), saying:

"Furthermore, let us recall again the fact that as of today, under our State laws, those who are harmed by unions have the right to go into court and sue if they can bring proof that they have been damaged by the action of unions or of a union."

Accordingly, even in the spirited argument against federal labor injunctions, there was no proposal, or expression of intention, to limit state court injunctions or other remedies under state law. The continuance of state court jurisdiction was clearly recognized.*

* It may be noted that it was not until several years later, when the party balance of power in the Senate had changed, that

A further expression of congressional intention, from both sides of the aisle, in the 80th Congress, 1st Session, as to continuance of state court jurisdiction under the Labor-Management Relations Act appears in the brief debate (93 Cong. Rec. 4860-4868, Legislative History, etc., pages 1375 to 1389) on Senator Aiken's amendment to provide for issuance of federal court injunctions at the instance of private parties where labor disputes interfered with the marketing of perishable commodities. The following colloquy between Senators Pepper and Wherry clearly recognizes the continuance of state court injunctive jurisdiction under state law (93 Cong. Rec. 4863, Legislative History, etc., at pages 1379 and 1380):

"Mr. Pepper. I am not sure but that the local citizen, the Senator from Nebraska describes, would have the right of injunctive relief in a local court. We are simply giving the right in a Federal

an investigation was instituted of labor injunctions in state courts, and Senator Murray, on February 8, 1951, presented a report, ordered to be printed (Senate Document No. 7, 82nd Congress, 1st Session) of the sub-committee on labor-management relations entitled *State Court Injunctions*. After that investigation a staff report to the sub-committee on labor-management relations, 82nd Congress, 2nd Session, simply suggested three principal remedies, that Congress should prescribe procedural rules such as those in the Norris-LaGuardia Act for state court injunction cases involving enterprises affecting interstate commerce, or that Congress should exclude all state court actions in labor disputes affecting interstate commerce or, preferably, that self-restraint on the part of state courts was the most promising cure for the improper use of labor injunctions. Congress has thus far adhered to the third alternative. That state courts have made invaluable contributions to a balanced federal system was recognized in that staff report on *State Labor Injunctions and Federal Law*.

Argument

court, but he still has local machinery of which he may avail himself to prevent irreparable damage, if he can make a showing. It seems to me this would bring the matter into Federal jurisdiction.

Mr. Wherry. I agree that there are remedies in every State, but we are passing a Federal law, to give injunctive relief.

"Mr. Pepper. The Senator would probably find the circuit judge closer than the Federal judge in most States, and I suggest a man would have a complete and adequate remedy in the local courts."

The debate overwhelmingly supports the congressional intention to continue state court remedies under state law. The very fact that the House Bill provision for private federal court injunctive relief was eliminated in conference makes it even plainer that, in finally maintaining the status quo as to the Norris-La Guardia Act in the federal courts, the Congress likewise maintained the status quo as to the state courts. House Conference Report No. 510 on H.R. 3020, at page 57, Legislative History, etc., 561, 93 Cong. Rec. 6377, puts plainly the Congressional insistence on a state court remedy that was even stronger when the House yielded its demand for private injunctions in the federal courts, the report saying:

"As stated above, the House bill, in section 12, provided for injunctions at the request of private persons, rather than by the Board, in cases like these. The conference agreement adopts the procedure of the Senate amendment. The power of the Board under this provision will not affect the

availability to private persons of any other remedies they might have in respect to such activities."

The congressional intention so overwhelmingly evidenced in the debates, conference reports, and legislative history, that state court jurisdiction under state law be continued, was thus expressed by the Congress in the language of the second sentence of Section 10(a) providing that the Board's powers shall not be affected by other means of adjustment or prevention. When the courts exercise jurisdiction they don't limit the Board or affect its power, but in saying that Congress said that state courts have jurisdiction.

B.

Board Is Empowered

The intention of Congress in Section 10(a) that state courts continue to adjudicate private rights under state law is further expressed in the first sentence providing that:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce."

The word "empowered" is derived from Section 5 of the Federal Trade Commission Act of September 26, 1914, 38 Stat. 719, 44 U.S.C.A., Section 45. Under that prior act, in *Federal Trade Commission v. Klesner*, 280 U.S. 19, 25, speaking through Mr. Justice Brandeis, the Supreme Court pointed out that the commission

had broad discretion to refuse to institute a complaint against an alleged wrongdoer engaged in an unfair practice, and said:

"Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrong."

The same construction was accordingly given to the corresponding language in the National Labor Relations Act in *Amalgamated, etc. v. Consolidated Edison Co.*, 309 U.S. 261, 267-268, and in *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350, 362. As restated in the National Licorice Company case,

"The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights. * * * Federal Trade Commission v. Klesner, 280 U.S. 19 * * *"

Under Section 10(a) of the National Labor Relations Act the National Labor Relations Board exercised a broad discretion, with the approval of the Supreme Court, see *National Labor Relations Board v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 18, and footnote 8, under the statutory language "empowering" it to remedy unfair labor practices, to decline to act in cases where in its judgment the public interest did not warrant its assumption of jurisdiction. The Board's broad discretion in the matter of jurisdiction continued under the Labor Management Relations Act wherein Congress, fully aware of the Board's practice continued the same language that the Board was "empowered": Sixteenth Annual Report of the National Labor Relations Board, pages 256 and 257 and cases cited. The

enunciation by the Board of standards defining areas in which it will and will not exercise jurisdiction has more recently been referred to by the Supreme Court in *National Labor Relations Board v. Denver Building & Construcion Trades Council*, 341 U.S. 675, footnote 14, with a statement (at page 684) that:

"Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case."

In short, as restated in *Haleston Drug Stores, Inc. v. National Labor Relations Board*, 187 F. 2d 418, 420, certiorari denied, 342 U.S. 815:

"The courts have uniformly recognized that the National Labor Relations Act did not confer private rights, but granted only rights in the interest of the public to be protected by a procedure solely to public ends. The proceeding authorized to be taken by the Board was not for the adjudication or vindication of private rights. * * *

"By the express language of § 10(a) the Board was and still is *empowered* (not directed) to prevent persons from engaging in unfair labor practices affecting commerce."

Should the National Labor Relations Board exercise its discretion to decline jurisdiction in certain types of cases, the reasoning and the decision in *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 776, where this "different

problem" was left open, may not preclude the exercise of jurisdiction under state law even by a state labor relations board in the exercise of its equally broad discretion to fashion remedies for the vindication of public rights.

However that may be, under that same decision and its elaborate statement of principles, *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 773, Congress has left outside the scope of its delegation the adjudication of private rights, thus clearly permitting exercise by the states of their judicial power. Congress has made clear, by its carefully-chosen language that the Board is "empowered" to prevent certain unfair labor practices affecting commerce, that it limited the National Labor Relations Board to protection of public rights by a procedure looking solely to public ends and intended that state courts continue to adjudicate private rights under valid state law.

C

Cede To Such Agency

That state court adjudication of private rights under state law, whether common law or statute law, was outside of the scope of the Labor-Management Relations Act is further evidenced by the manifestations of congressional intention in the proviso to Section 10(a) empowering the National Labor Relations Board to cede to a state "agency", on an industry-wide basis for determination under a state "statute" consistent with the corresponding provisions of the

federal act, jurisdiction over any cases. This clarifying proviso as to state labor relations board jurisdiction in administering public remedies, in view of its legislative history and purpose and detailed language makes it plain that the Congress was not dealing with state court jurisdiction because it had not dealt with adjudication of private rights and had at no time intended to affect continuing state court jurisdiction under state law.

(1) *The purpose and legislative history of this clarifying proviso is simple and plain. It confirms the general rule that it is ordinarily contrary to the nature of a proviso to enlarge or extend the operation of a statute: See Savage v. Jones, 225 U.S. 501, 533, infra. This proviso aptly illustrates the statement in McDonald v. United States, 279 U.S. 12, 21, that*

“* * * a proviso is not always limited in its effect to the part of the enactment with which it is immediately associated; it may apply generally to all cases within the meaning of the language used. * * * Sometimes it is used merely to safeguard against misinterpretation * * *”

The purpose of the proviso is set forth in the Senate Report, the Senate Minority Report and the Conference Report, Legislative History, etc., 432, 500, 556. Senate Report No. 105 on S. 1126, at page 26, stated:

“Section 10(a): The proviso which has been added to this subsection permits the National Board to allow State labor-relations boards to take final jurisdiction of cases in border-line industries (i.e., border-line insofar as interstate com-

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merce is concerned), provided the State statute conforms to national policy."

Senate Minority Report No. 105, at page 38, states:

"Section 10(a) adds a proviso to the present act empowering the Board to concede to any agency for (sic) any State or Territory jurisdiction over any cases not predominantly national in character even though such cases involve an effect upon interstate commerce. We agree with the majority that it is desirable thus to clarify the relations between the National Labor Relations Board and various agencies which States have set up to handle similar problems. This proposal is made necessary by the decision of the Supreme Court in *Allegheny Ludlum Steel Corp. v. William J. Kelley and H. M. Myron Lewis, etc.*, decided on April 7, 1947."

House Conference Report No. 510, on H. R. 3020, at page 53, 93 Cong. Rec. 6376 paraphrasing in part the language of the proviso, stated:

"The Senate amendment contained a proviso at the end of section 10(a) authorizing the Board to cede jurisdiction over any cases in any industry to State and Territorial agencies * * * The House bill contained no provision corresponding with the proviso of section 10(a) of the Senate amendment. The conference agreement adopts this proviso."

The Supreme Court in *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 313, referred to the

"* * * purpose of the proviso * * * to meet situations made possible by *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767 * * * where no State agency would be free to take jurisdiction of cases over which the National Board had declined jurisdiction."

The proviso, enacted substantially as introduced in the Senate ten days after the *Bethlehem* decision, was designed to carry out solely its limited function of clarifying the law, supporting the separate opinion of Mr. Justice Frankfurter (in which Mr. Justice Murphy and Mr. Justice Rutledge joined) and removing any doubt as to the legality of the agreement or general understanding, set forth as an appendix to that separate opinion, 330 U.S. 767, 784-797, between the National Labor Relations Board and the New York State Labor Relations Board. In that Appendix, at page 789, footnote 1, it was suggested that:

"The National Act contains no provision authorizing the National Board to enter into compacts or agreements with State Boards, but would seem to require the National Board in each case to exercise its discretion whether or not to proceed."

In *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 776, the court had refrained from passing, in its decision relating to recognition of foreman bargaining units, on the legal effect of the understandings between the National and State Boards, saying:

"The National and State Boards have made a commendable effort to avoid conflicts in this over-

Argument

lapping state of the statute. * * * the National Board made no concession or delegation of power to deal with this subject."

The very next month after the *Bethlehem* decision, the National and New York Boards decided to continue on the basis of their existing understandings. The members of the National Labor Relations Board filed, 12 Federal Register 3443, a statement of May 22, 1947, that:

"(a) In the opinion of both Boards, there is nothing in the decision * * * of * * * April 7, 1947, forbidding or disapproving such collaborative arrangements as are contained in the existing understanding * * * set forth in the appendix to the separate opinion of Mr. Justice Frankfurter * * *

"(b) The existing understanding shall be continued in full force and effect * * *"

The language of the proviso is limited to the field of its purpose, impaired only by a slight change in conference of the limitation as to consistent state law. As reported and passed in the Senate, Legislative History, etc., pages 123 and 252, the concluding limitation in the proviso read:

"* * * provided the State agency conforms to national policy, as herein defined, in the determination of such disputes."

The Conference Report No. 510, at page 12 (83 Cong. Rec. 6364), Legislative History, etc. page 516, recast this limitation to read, as it appears in the Labor-Management Relations Act:

“ * * * unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.”

Whatever the intended purposes in that change of language, it did not result in amendments by the New York Legislature bringing its state statute, modeled on the National Labor Relations Act of 1935, more closely in line with the changes embodied in the Labor Management Relations Act of 1947. After that limitation was added in conference, the clarifying proviso was sapped of vitality and the contemplated agreements with state labor relations boards were not consummated.⁵

⁵ The conference committee made one other change, without any intended change in meaning, of a feature of the amendment as introduced and passed in the Senate that far-marked its New York State Labor Relations Board origin and purpose. S. 1126, as reported, and passed by the Senate, Legislative History, etc., 123, 251, empowered the National Board by agreement with any state agency “ * * * to concede to such agency jurisdiction” and that word “concede” harmonized perfectly with the central idea of an agreement clarifying jurisdiction in accordance with New York usage. The word “concede” had been used in the New York State Labor Relations Act in seeking to avoid a clash with federal authority, *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 223, and as this carefully-chosen wording was construed in *Davega City Radio v. State Labor Relations Board*, 381 N.Y. 13, 22 N.E. 2d 145, 149,

“It does not exempt from its jurisdiction all who are subject to the National Act but only those as to whom the employer and the Board agree are subject to the National act.”

The Senate Minority Report No. 105 at page 38 raised no objection to this power of “ * * * the Board to concede * * * to clarify the

An adumbration of what was intended appears in the agreement of August 10, 1945, etc., between the National Labor Relations Board and the Puerto Rico Labor Relations Board, 12 Federal Register 7902; in 1947 the Territorial Board continued to exercise jurisdiction over all cases in designated industries or enterprises, and the National Labor Relations Board, on October 24, 1947, stated that in the Labor Management Relations Act:

"* * * it was the apparent intent of Congress that State and Territorial agencies designed for the purpose of disposing of matters concerning representation and labor disputes be encouraged to continue in their assigned functions over matters purely local in character."

The proviso speaks in terms of an "agreement" with any "agency" or state labor relations board as the word agency indicates and the Senate said it meant: Senate Report No. 105 at p. 26, Legislative History, etc. 432. The proviso speaks in terms of industry-wide jurisdiction. The proviso speaks only of a state statute as applicable, since state labor relations boards were wholly creatures of statute, and said nothing as to the common law as well as statute law which state courts traditionally applied. The proviso speaks of inconsistency with the corresponding provision of the Labor Management Relations Act, which

relations" and the House Conference Report No. 510 at page 52 indicated no shift in meaning from concede to cede in restating that the Senate proviso authorized the board to "cede" jurisdiction. The proviso continued to speak in terms of "agreement with any agency" of any state.

must mean, as read in *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 313, that:

"Where the state and federal laws do not overlap, no cession is necessary because the State's jurisdiction is unimpaired."

In every respect, therefore, the language of the proviso, in harmony with its legislative history and purpose, expresses an intention to clarify the law as to jurisdiction of state labor relations boards and expresses the intention of the Congress that the Labor Management Relations Act did not overlap the jurisdiction of state courts to adjudicate private rights under state laws where no cession was necessary or provided for. In any event the National Labor Relations Board could not cede more jurisdiction than it had, it had no jurisdiction over the adjudication of private rights, and by no means was this proviso intended to enlarge the scope of the Labor Management Relations Act or the jurisdiction of the National Labor Relations Board.*

There was no debate on this clarifying proviso, and the legislative debates on the Ball amendment,

* Similarly, in *Savage v. Jones*, 225 U.S. 501, 533, the Pure Food and Drugs Act was limited to a condemnation of misbranding and (page 524) it was held that "the statute does not compel a disclosure of formula or manner of combination." Yet there was a proviso (foot of page 531) that generally there need be no disclosure of trade formulas of proprietary foods that contained no unwholesome added ingredient. The court, through Mr. Justice Hughes, said, "this proviso merely relates to the interpretation of the requirements of the act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions."

which became Section 8(b)(1) of the act, introduced on the floor of the Senate after this clarifying proviso was already in the Senate bill, plainly evidences the controlling intention of Congress that state courts, without anycession from or agreement with the National Labor Relations Board, should continue to adjudicate private rights under valid state law.

D.

Deletion of Exclusive

The Congress expressed its intention, as to not excluding state court jurisdiction, not only by employing the language that it did use in Section 10(a) of the Labor-Management Relations Act, as we have seen, but also by deleting the language which the National Labor Relations Act had employed describing the National Labor Relations Board's power up to 1947, as exclusive. This change is in striking contrast to the converse change that was made in the United States Warehouse Act in 1931 when Congress added, with the broad effect found in *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 223, the mandatory words that the power, jurisdiction and authority of the Secretary of Agriculture "shall be exclusive." Here the word "exclusive" had been used in the National Labor Relations Act of 1935, as noted in many decisions thereunder, to characterize the power of the National Labor Relations Board, but the Labor Management Relations Act deleted the word "exclusive".

Argument

Even when the Congress in 1935 had described the power of the National Labor Relations Board as exclusive, it expressed no intention to touch the field of state court adjudication of private rights under state laws; it intended by this provision to make the jurisdiction of the board exclusive, primarily as against other federal agencies, to enforce the public rights created by the National Labor Relations Act. As Senator Walsh clearly stated, 79 Cong. Rec. 7661,

"The courts will have in the future all the jurisdiction they have ever had in relation to all the differences which arise between employers and employees * * *"

Senator Wagner, 79 Cong. Rec. 7654 recognized the continued availability of

"* * * injunctions * * * issued by the thousands by courts all over the country"

and based on that fact his contrasting argument that

"There is no remedy today, however, when an employer uses his economic pressure to compel a worker to join a particular organization or not to join a particular organization."

It was never supposed that the National Labor Relations Board, with "powers * * * modeled upon those of the Federal Trade Commission" as Senator Wagner explained in introducing the bill on February 21, 1935, 79 Cong. Rec. 2372, had any authority to adjudicate private rights or that the powers of state courts would be affected.

The word "exclusive", which was not found in the Federal Trade Commission Act after which this

measure was modeled, was placed in the National Labor Relations Act to make the power of the National Labor Relations Board exclusive within its field where a predecessor Board had been severely limited by the jurisdiction of other federal labor boards: The Wagner Labor Disputes Act, 35 Columbia Law Review 1098, 1114. By presidential orders in January of 1935, while the old National Labor Relations Board was locked in a jurisdictional struggle with the N.R.A., the National Labor Relations Board was deprived of jurisdiction over labor disputes arising in such industries as had independent labor boards, such as the Automobile Labor Board and the elaborate system of industrial relations boards in the bituminous coal industry, authorized to issue final orders: *Lorin and Wubnig, Labor Relations Boards* (1935) 326-328, 428. On February 21, 1935, before the National Industrial Recovery Act had been held unconstitutional, when Senator Wagner introduced his bill which was later enacted as the National Labor Relations Act of 1935, he specified that the power of the proposed permanent National Labor Relations Board, under Section 10(a) "shall be exclusive", 79 Cong. Rec. 2369, 2371, and explained:

"Finally, the existence of numerous industrial boards whose interpretations of section 7(a) are not subject to the coordinating influence of a supreme National Labor Relations Board, is creating a maze of confusion and contradictions. While there is a different code for each trade, there is only one section 7(a), and no definite law written by Congress can mean something different in each industry."

Argument

Specific provision was made in the bill, Section 16, 79 Cong. Rec. 2371, enacted as Section 14, that whenever the application of the provisions of Section 7(a) of the National Recovery Act conflicted, the National Labor Relations Act should prevail. Mr. Walsh, in submitting the report of the Committee on Education and Labor, Senate Report No. 573, 74th Congress, 1st Sess., on May 2, 1935, at pages 1 and 15, stated, his concluding words being oft quoted, that:

"In view of the impending expiration on June 16, 1935, of the National Industrial Recovery Act, with its fair promise in section 7(a) of promoting industrial peace by the recognition of the rights of employees to organize and bargain collectively, and of Public Resolution 44, Seventy-third Congress, under which the present National Labor Relations Board was created, the time has come for a clean decision either to withdraw that promise or to implement by effective legislation. * * *

"Section 10(a) gives the National Labor Relations Board exclusive jurisdiction to prevent and redress unfair labor practices, and, taken in conjunction with section 14, establishes clearly that this bill is paramount over other laws that might touch upon familiar subject matters. Thus it is intended to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American law regarding collective bargaining."

Congress manifestly made exclusive the power of the permanent National Labor Relations Board by way of excluding the too-many federal administrative authorities confusing the development of the federal law (the only law) regarding collective bargaining.⁷

Congress was concerned with reaching the employer who refused to recognize and bargain with representatives of his employees.⁸

Congress made exclusive this new federal power to reach such an employer in this new field where the only law was federal law. Congress made this new power exclusive because of the confusion—when the bill was introduced—resulting from dispersion of federal authority among several federal boards under the N.I.R.A. Congress thus established a single paramount federal administrative authority to make this new law and to develop federal law regarding col-

⁷ Twelve years later William Hutcheson, 80th Cong. 1st Sess., House Committee on Education and Labor, Hearings on Amendments to the National Labor Relations Act (1947), Vol. 3, page 1749, vividly recalled that

“At one time we had here under the Government, 23 different commissions dealing with labor questions. We had one case . . . juggled around . . . different . . . commissions for over 2 years.”

⁸ At that time, as the first chairman of the National Labor Relations Board, J. Warren Madden, Balance in Employer-Employee Law, NLRB as Key, 1 Lab. Rel. Rep. 305 (1937) stated the situation,

“ . . . if an employer refused to recognize and bargain with representatives of his employees there was no law to reach him, though there was plenty of law to reach his employees after they had struck.”

Argument

lective bargaining where there had been no law to reach the employer.

In using the word "exclusive", under such circumstances, there was no thought of excluding state court adjudication of private rights under state law. There was no state law in the field with which Congress was dealing in the National Labor Relations Act."

Under such circumstances, even more than in *California v. Zook*, 336 U.S. 841, 847, it would have been

" * * * startling to discover congressional intention to 'displace' state laws when there were no state laws to displace when Congress acted."

On the contrary, the intent of Congress, as stated by the responsible committee chairman, Senator Walsh, in debate, 79 Cong. Rec. 7661, *supra*, was that the courts should have

" * * * all the jurisdiction they have ever had."

Practical construction accorded with congressional intention. From 1935 to 1947 state court jurisdiction under state law in connection with labor disputes to

⁹ Madden, Balance in Employer-Employee Law, etc., *supra*, 1 Lab. Rel. Rep. 305, observed:

"Here there was an open field, untouched by existing state laws, which desperately needed to be brought under regulation. * * * It [Congress] therefore provided that there should be some law for employers, to accompany the large amount of existing law for employees."

Argument

adjudicate private rights was never questioned and was consistently exercised.¹⁰

In *Allen-Bradley Local No. 1111 etc. v. Wisconsin Employment Relations Board*, 315 U.S. 740, 748, footnote 7, the Supreme Court observed that the Committee Reports plainly indicate that the National Labor Relations Act was not a police court measure and quoted from S. Rep. No. 573, 74th Cong., 1st Sess., page 16, the decisive statement that

"The remedies against such acts in the State and Federal courts and by the invocation of local police authorities are not adequate, as arrests and labor injunctions in industrial disputes throughout the country will attest."

Labor injunctions were not excluded. The jurisdiction of state courts was not excluded.

This page of history shows that when Congress deleted the word "exclusive" in the Labor-Management Relations Act, it did not thereby make the public remedies of the National Labor Relations Board any more exclusive of state court jurisdiction. On the

¹⁰ In *Milk Wagon Drivers, etc. v. Meadowmoor Dairies*, 312 U.S. 287, 299, where it apparently had not been suggested that the National Labor Relations Act excluded state courts, the Supreme Court noted that:

"If the people of Illinois desire to withdraw the use of the injunction in labor controversies, the democratic process for legislative reform is at their disposal. * * * they choose to leave their courts with the power which they have historically exercised * * *"

Argument

contrary, as we have seen, Congress was imposing on labor organizations equalizing unfair labor practices that were opposed precisely because they did duplicate state court remedies to the extent that the National Labor Relations Board might prevent the same union conduct, albeit for the sole and different purpose of protecting the free flow of commerce. In consciously creating a so-called double liability, under federal law where state law also applied, Congress carefully deleted the word "exclusive" from excess of caution to preserve beyond question such helpful and indispensable state court jurisdiction.

The legislative history indicates that the word "exclusive" was deliberately omitted in Section 10(a) in S. 1126, as reported on April 17, 1947, and in H. R. 3020, as it passed the Senate on May 13. The Senate at the same time added the clarifying proviso for conceding of jurisdiction by agreement with any state agency. Senate Report No. 105 on S. 1126 page 26, Legislative History, etc., page 432, mentioned just the proviso in discussing Section 10(a). The Senate Minority Report No. 105, page 37, Legislative History, etc., pages 499 and 500, approved the proviso to "clarify the relations" but objected to the deletion of "exclusive" stating:

"Section 10(a) as amended would change the National Labor Relations Act by omitting the present language that 'this power shall be exclusive.' This language was included to make it clear that all unfair labor practices are to be handled solely by the National Labor Relations Board.

Argument

No good reason for omitting this provision has been cited to us."

Previously, in the House, as we have noted under Point II-A, the word "exclusive" in Section 10(a) was retained and emphasized at the same time that private labor injunctions were being provided for before federal district courts: House Report No. 245 on H. R. 3020, 40 and 44, Legislative History, etc. 331 and 335. At an early stage of the debate on the floor of the Senate, on April 25, 1947, Senator Murray in opposing the measure as it had been reported, presented as one objection the deletion of the word "exclusive" in describing in Section 10(a) the power of the National Labor Relations Board, and reiterated

"This language was included to make it clear that all unfair labor practices are to be handled solely by the National Labor Relations Board."

Throughout, it occurred to no one that the clarifying proviso for ceding jurisdiction called for the deletion of the word "exclusive". Thus, in the House Conference Report No. 510, at page 52, Legislative Report, etc., 556, the report discusses the proviso as a separate matter without any indication anyone supposed it had any bearing on the deletion of the word "exclusive".

The conference report presents the following independent and complete discussion of the intention of Congress in deleting the word "exclusive":

"The House bill omitted from section 10(a) of the existing law the language providing that

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the Board's power to deal with unfair labor practices should not be affected by other means of adjustment or prevention, but it retained the language of the present act which makes the Board's jurisdiction exclusive. The Senate amendment, because of its provisions authorizing temporary injunctions enjoining alleged unfair labor practices and because of its provisions making unions suable, omitted the language giving the Board exclusive jurisdiction of unfair labor practices, but retained that which provides that the Board's power shall not be affected by other means of adjustment or prevention. The conference agreement adopts the provisions of the Senate amendment. By retaining the language which provides the Board's powers under section 10 shall not be affected by other means of adjustment, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies."

It was true that S. 1126 as reported, omitting the word exclusive in Section 10(a), had provided for suits in district courts of the United States for violation of collective bargaining contracts in Section 301 and had authorized temporary injunctions against unfair labor practices in Section 10(g) and (1), Legislative History, etc., 130, 131, 151. In the light of the House Conference Report, therefore, the word "exclusive" was deleted partly because of this jurisdiction given to the federal courts, recognizing that the

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word "exclusive" had not been applicable to the state courts.¹¹

The Conference Report, at page 57, Legislative History, etc., page 561, 93 Cong. Rec. 6377, expressly refers to the provision authorizing the Board to secure temporary injunctions in the federal district courts enjoining alleged unfair labor practices and states explicitly that:

"The power of the Board under this provision will not affect the availability to private persons of any other remedies they might have in respect to such activities."

Under the circumstances, the deletion of the word exclusive is significant. The House used the word when it dropped any reference to "other means of adjustment or prevention." The Senate reversed the House and dropped the word at the same time that it used language expressly recognizing any other means of adjustment or prevention. The word exclusive was

¹¹ This may be compared with the situation in Senator Wagner's bill which became the National Labor Relations Act, the bill providing in Section 11, 79 Cong. Rec. 2369, 2370, that, solely at the request of the National Labor Relations Board, the several district courts of the United States were invested with jurisdiction to prevent and restrain any unfair labor practice affecting commerce, and also providing in Section 10(a) with respect to the power of the Board to prevent unfair labor practices that:

"This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that have been or may be established by agreement, code, law or otherwise, except as provided in section 11."

Later amendments deleted the exception and the provision for federal district court injunction, 79 Cong. Rec. 7651, 7652.

deleted by a congress which was not only authorizing certain remedies in the federal courts but was particularly interested in not superseding state court remedies which had been asserted by the opposition as a reason for not imposing a so-called 'double liability'. In the teeth of that opposition, Congress added the, to it, all-important equalizing amendments empowering the National Labor Relations Board in the public interest to prevent unfair labor practices by labor organizations. By deleting the word exclusive, at the same time the Senate provided that the Board's powers under Section 10 shall not be affected by other means of adjustment or prevention, the Senate intended, and the Conference Agreement makes clear, House Conference Report No. 510, page 52, Legislative History, at page 556, 93 Cong. Rec. 6376, that

"* * * when two remedies exist, one before the Board and one before the courts, the one before the Board shall be in addition and not in lieu of, other remedies."

In summary, in Section 10(a) of the Labor Management Relations Act, (A) in recognizing the continued existence of any other method of adjustment or prevention, (B) in providing only that the National Labor Relations Board was empowered to prevent unfair labor practices in the public interest as distinguished from the adjudication of private rights over which the Board was given no jurisdiction, (C) in clarifying by a proviso the ceding of identical jurisdiction to provide such public remedies by agreement with state labor relations boards as distinguished from the jurisdiction of state courts where there was

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no thought of any cession in connection with their then unquestioned continuing jurisdiction under state law, and (D) in deleting the former provision that the Board's jurisdiction should be exclusive, Congress clearly manifested its intention not to revolutionize our federal system by pre-empting the several fields of the unfair labor practices on the part of labor organizations added in the equalizing amendments of 1947 so as to lay low, in a Gulf-to-Canada-wide swath extending from Atlantic to Pacific the many-branched deeply-rooted fruitful and indispensable state court jurisdiction under valid state laws to adjudicate private rights. Congress gave no consideration to any such supersedure, much less to the perplexing ramifications as to where any such line of supersedure under a national labor law might be drawn with respect to various types of state laws. Congress provided no substitute and made it plain that it was not dealing with adjudication of private rights. The 80th Congress, in its 1st Session, in adding equalizing amendments empowering the National Labor Relations Board, in the public interest to prevent unfair labor practices by labor organizations as listed in Section 8(b) did not enter the field of or intend to supersede state court jurisdiction to adjudicate private rights under valid state laws. To state court jurisdiction, Congress consents.

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POINT II

CONGRESS HAS NOT ENTERED THIS FIELD
OF PRIVATE RIGHTS

Petitioner's second contention is that state power is not excluded from a field Congress has not entered. Congress has delegated to the National Labor Relations Board, as to the Federal Trade Commission under prior similar statutory language intentionally followed, no jurisdiction to adjudicate private rights, and the jurisdiction of a state court in a field such as this accordingly continues. As restated in *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 155.

"It has long been recognized that in those fields of commerce where national uniformity is not essential, either the state or federal government may act. * * * Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation."

We must know the boundaries of the field, or subject about which Congress has made provision, before we can say that congressional legislation under the Commerce Clause precludes a state from the exercise of any power reserved to it by the Constitution: *Missouri K. & T. R. Co. v. Haber*, 169 U.S. 613, 624; *Savage v. Jones*, 225 U.S. 501, 532; *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 155-156, 157-158, 167-

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168; *Hines v. Davidowitz*, 312 U.S. 52, 61; *International Union, etc. v. Wisconsin Employment Relations Board*, 336 U.S. 245, 253, 254.¹²

Where Congress has entered a field, if at all, through a federal commission or board, it is generally clear that with respect to a subject withheld from the power of that federal agency Congress has not entered the field: *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 773; *Atchison, T. & S. F. R. Co. v. Railroad Commission*, 283 U.S. 380, 392. See also *International Union v. Wisconsin Employment Relations Board*, 336 U.S. 245, 253, 254, and *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749, *supra*.¹³

¹² These cases and a number of others helpful in determining whether Congress has entered a field have been listed, and the field entered by Congress in each case briefly identified, in the first footnote under Point I, *supra*, where the general rule was recognized that in determining whether Congress has entered the field in issue, the presumption is in favor of the state and Congress must clearly manifest an intention to enter the field. Under the National Labor Relations Act and the Labor Management Relations Act Congress has not by abatement projection asserted pervasive control over a general subject of labor disputes. *Allen-Bradley Local No. 1111, etc. v. Wisconsin Employment Relations Board*, 315 U.S. 740, 750, 749 ("Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board"), and the particular subjects it has regulated must be determined by the terrain of specific situations. *Amalgamated, etc. v. Wisconsin Employment Relations Board*, 340 U.S. 383, 390 ("this field" "of peaceful strikes for higher wages").

¹³ In *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 773, the Supreme Court said:

"In the National Labor Relations Act, Congress has sought to reach some aspects of the employer-employee rela-

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The Labor Management Relations Act, read in the light of its purposes and its legislative history, does not enter this field of private rights and Congress has delegated to the National Labor Relations Board no authority to adjudicate private rights. The Labor Management Relations Act, amending the National Labor Relations Act, drawn in analogy to the Federal Trade Commission Act, "empowers" the National Labor Relations Board to prevent certain unfair practices, in a proceeding narrowly restricted to the protection and enforcement of public rights, giving effect, through broad administrative discretion, to the declared public policy of such legislation based upon the Commerce Clause: *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350, 362-363.

tion * * * it has dealt with the subject or relationship but partially, and has left outside the scope of its delegation other closely related matters. * * * Such was the situation in *Allen-Bradley* * * * where we held that employee and union conduct over which no direct or delegated federal power was exerted by the National Labor Relations Act is left open to regulation by the state."

In *International Union v. Wisconsin Employment Relations Board*, 336 U.S. 245, 253, it is said that:

"Congress made in the National Labor Relations Act no express delegation of power to the Board to permit or forbid this particular union conduct, from which an exclusion of state power could be implied."

In *Atchison, T. & S. F. R. Co. v. Railroad Commission*, 283 U.S. 380, 393, the Supreme Court clearly reasoned that:

"The considerations which led the Court to the conclusion that the power to compel the construction of such terminals had been withheld from the federal commission also make it clear that the authority which resided in the state had not been taken away * * *"

As set forth in *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 268,

"In both Houses of Congress, the Committees were careful to say that the procedure provided by the bill was analogous to that set up by the Federal Trade Commission Act, section 5 [38 Stat. 719, 15 U.S.C., section 45], which was deemed to be 'familiar to all students of administrative law'. That procedure, which was found to be prescribed in the public interest as distinguished from provisions intended to afford remedies to private persons, was fully discussed by this Court in *Federal Trade Commission v. Klesner*, 280 U.S. 19, 25 * * *"

In the National Labor Relations Act, in keeping with its purposes, the Committee on Labor of the House of Representatives, H. R. Rep. No. 972, 74th Cong., 1st Sess., page 24, expressly stated that:

"No private right of action is contemplated." Congress deliberately followed the pattern of the Federal Trade Commission Act in thus providing that the Board was "empowered" to "prevent" unfair practices and adopted the settled construction of that language that it did not authorize adjudication of private rights. In *Federal Trade Commission v. Klesner*, 280 U. S. 19, 25, where a former lessor engaged in the unfair practice of copying the name "Shade Shop" long used by a lessee who removed under acrimonious circumstances, the jurisdiction of the Supreme Court of the District of Columbia to determine whether to enjoin use of that name and adjudicate the private right of the parties was not questioned and the Supreme

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Court of the United States, speaking through Mr. Justice Brandeis, construing Section 5 of the Federal Trade Commission Act which empowered that commission to prevent such unfair practices, held that "Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs." In the light of that decision, state courts have continued to adjudicate private rights under state law in connection with such unfair acts, even though the Federal Trade Commission is empowered to prevent such unfair practices: 2 Nims, *Unfair Competition* (4th Edition, 1947), page 1186, Section 373(e). Congress followed this precedent, in the National Labor Relations Act. When the Labor Management Relations Act amended the National Labor Relations Act it retained that identical, authoritatively construed language by which the Board was "empowered to prevent" unfair practices affecting interstate commerce. Expression to this then obvious intention was voiced in Senate Report No. 105 on S. 1126, page 8, Legislative History, etc., 414, in pointing out, as to the addition of injunctive relief, that:

"Hence, we have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices * * *"

¹⁴ The same Senate Report No. 105 at page 23, Legislative History, etc., 429, in the same vein cautioned (in connection with a fifth unfair labor practice, later deleted, covering violations of collective bargaining agreements) that it would not be conducive to

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The Conference Report, House Conference Report No. 510 on H. R. 3020, at page 57, Legislative History, etc., 561, *supra*, also makes clear that:

"The power of the Board * * * will not affect the availability to private persons of * * * remedies they might have in respect to such activities."

Clearly the Labor Management Relations Act, like the National Labor Relations Act and the Federal Trade Commission Act delegated to a federal administrative agency no power to adjudicate private rights. Congress thus continued in its intention, authoritatively stated by Senator Walsh, 79 Cong. Rec. 7661, in connection with the National Labor Relations Act that

"The courts will have in the future all the jurisdiction they have ever had in relation to all the differences which arise between employers and employees * * *"

In the Labor Management Relations Act Congress did not enter the field of civil liability or adjudication of private rights. This federal legislation accordingly did not override the jurisdiction exercised by the state court in this case to adjudicate the private right of an employer under familiar principles of the

the purpose of the bill if the Board took jurisdiction over cases that could be adjusted by litigation in court or "if in the guise of unfair labor practice cases it entertained damage actions arising out of breach of contract. * * * Any other course would engulf the Board with a vast number of petty cases that could best be settled by other means."

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common law in force in Pennsylvania against harm, and substantial harm it was, from concerted activity for an unlawful purpose.

A similar distinction, recognizing civil liability as a field which Congress had not entered when it made no provision therefor, was recognized and reaffirmed before the decision in *Federal Trade Commission v. Klesner*, supra, 280 U.S. 19, 25, and before the Federal Trade Commission Act.

In the leading case of *Savage v. Jones*, 225 U.S. 501, 534-536, there appears a pointed, meticulous re-statement and reaffirmation of the very pertinent decision in *Missouri K. & T. R. Co. v. Haber*, 169 U.S. 613, as follows:

"In *Missouri, Kansas & Texas Ry. Co. v. Haber*, supra, the Supreme Court of Kansas had affirmed a judgment against the railway company for damages caused by its having brought into the State certain cattle alleged to have been affected with Texas fever which was communicated to the cattle of the plaintiff. The recovery was based upon a statute of Kansas which made actionable the driving or transporting into the State of cattle which were liable to communicate the fever. It was contended that the act of Congress of May 29, 1884, c. 60 (23 Stat. 31), known as the Animal Industry Act, together with the act of March 3, 1891, c. 544 (26 Stat. 1044), appropriating money to carry out its provisions and § 5258 of the Revised Statutes, covered substantially the whole subject of the transportation from one State to an-

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other State of live stock capable of imparting contagious disease, and therefore that the State of Kansas had no authority to deal in any form with that subject. The act of 1884 provided for the establishment of a bureau of animal industry, for the appointment of a staff to investigate the condition of domestic animals and for report upon the means to be adopted to guard against the spread of disease. Regulations were to be prepared by the commissioner of agriculture and certified to the executive authority of each State and Territory. Special investigation was to be made for the protection of foreign commerce and the Secretary of the Treasury was to establish such regulations as might be required concerning exportation. It was provided that no railroad company within the United States nor the owners or masters of any vessel should receive for transportation, or transport, from one State to another any livestock affected with any communicable disease, nor should any one deliver for such transportation, or drive on foot or transport in private conveyance from one State to another any livestock knowing them to be so affected. It was made the duty of the commissioner of agriculture to notify the proper officials or agents of transportation companies doing business in any infected locality of the existence of contagion; and the operators of railroad, or the owners or custodians of livestock within such infected district, who should knowingly violate the provisions of the act were to be guilty of a misdemeanor, punishable by fine or imprisonment.

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"The court held that this Federal legislation did not override the statute of the State; that the latter created a civil liability as to which the Animal Industry Act of Congress had not made provision. The court said (*supra*, pp. 623, 624):

"May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together. *Sinnot v. Davenport*, 22 How. 227, 243. * * * Whether a corporation transporting, or the person causing to be transported from one State to another cattle of the class specified in the Kansas statute, should be liable in a civil action for any damages sustained by the owners of domestic cattle by reason of the introduction into their State of such diseased cattle, is a subject about which the Animal Industry Act did not make any provision. That act does not declare that the regulations established by the Department of Agriculture should have the effect to exempt from civil liability one who, but for such regulations, would have been liable either under the general principles of law or under some state enactment for damages arising out of the introduction into that State of cattle so affected.

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And, as will be seen from the regulations prescribed by the Secretary of Agriculture, that officer did not assume to give protection to any one against such liability.' "

As reaffirmed in *Savage v. Jones*, 225 U.S. 501, 534-536, *supra*, and never questioned, the decision in *Missouri K. & T. R. Co. v. Haber*, 169 U.S., 613, 623-625, is decisive. Here, as there, the federal legislation makes no provision about the subject of damages sustained by reason of federally prescribed conduct. Just as the Secretary of Agriculture there did not assume to give protection to anyone transporting cattle against such liability for damage done by the cattle, so here the National Labor Relations Board has no authority to create an immunity for any labor organization that incurs liability to anyone under state statute or common law by reason of conduct amounting to an unfair labor practice. The state law of torts, as enlarged by state statute in that case, remained effective to permit recovery of damages sustained from diseased cattle which Congress had said shouldn't be brought into the state and here the state law is likewise effective to permit recovery of damages, or injunctive relief where the damage would be irreparable, for something which has been done which Congress likewise said should not be done. This case is well within the decision there and its reasoning (at page 625) that:

"The controlling object of the regulations was to prevent the spreading from one State to another of the cattle disease in question, not to deprive anyone of the right to recover damages for injury inflicted upon his domestic cattle by rea-

son of their being brought into contact with diseased cattle."

In short, the labor unfair practice provisions of the Labor Management Relations Act do not exempt from civil liability a labor organization which, but for such equalizing amendment, would have been liable either under general principles of law or an enactment of a state. Whether the union should be liable in a civil action for any damages, or should be enjoined to protect that same private right, is a subject about which the Labor Management Relations Act makes no provision. As reaffirmed in *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 250, 362,

"The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights."

In harmony with the foregoing decisions, legislative provisions and legislative history indicating that Congress had not entered the field, state courts have continued, since the National Labor Relations Act was amended by the Labor Management Relations Act, to exercise jurisdiction under state law to decide cases in contract, tort and other fields of law whether or not there might be presented by the facts in issue or the surrounding controversy an unfair labor practice which the National Labor Relations Board was empowered, in its discretion in the public interest, to prevent. Before detailing some of the great weight of authority, we will first distinguish certain cases that constitute the exception, so to speak, that proves the rule.

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By a parity of reasoning, the state courts at the same time decline to enforce the new public rights created by the Labor Management Relations Act when it added its outlawry of certain equalizing unfair labor practices on the part of labor organizations: *Gerry of California v. Superior Court*, 32 Cal. 2d 119, 194 P. 2d 689, 691, 692-694; *Ex Parte De Silva*, 33 Cal. 2d 76, 199 P. 2d 6, 7-8; *Sommer v. Metal Trades Council, etc.* — Cal. —, 254 P. 2d 559, 563; *General Electric Co. v. International Union, etc.*, 108 N.E. 2d 211, 219-220 (Court of Appeals of Ohio); *M. T. Reed Construction Co. v. Jackson Building Trades Council*, 51 A.L.C. 287, 27 L.R.R.M. 2161 (Mississippi, Leake County); *J. C. Robinson v. Chauffeurs, etc.*, 51 A.L.C. 1052, 28 L.R.R.M. 2453 (Tennessee Court of Appeals). Compare *Costaro v. Simons*, 302 N.Y. 318, 98 N.E. 2d 454, 455 ("necessity of resorting in the first instance to the National Labor Relations Board") and *State ex rel. Tidewater Shaver Barge Lines v. Dobson*, — Ore. —, 245 P. 2d 903, 927 ("status quo until the Board had time and opportunity"). Relying primarily upon *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 264, *supra*, *Gerry of California v. Superior Court*, 32 Cal. 2d 119, 194 P. 2d 689, 692, *supra*, rejected

"* * * petitioner's argument that the state courts have concurrent jurisdiction with the federal courts to enforce rights created by a federal statute."

Likewise, the National Labor Relations Act failed to vest jurisdiction in the federal district courts to

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grant relief against unfair labor practices when it provided an adequate administrative remedy for its new public rights before the National Labor Relations Board—*Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F. 2d 183, 188 (C. A. 4). Such decisions are inapplicable here, where the state court adjudicates private rights under state law and does not attempt to enforce new public rights created by the Labor-Management Relations Act. The distinction is recognized in *Teller*, Labor Disputes and Collective Bargaining, Section 398.24, 1950 Supplement, page 60:

“There is no authority in state courts to grant injunctions at the instance of private parties, restraining the commission of unfair labor practices specified in Section 8. Only the Board may do so, and in the federal courts. On the other hand, it is doubtful that the Act has deprived state courts of the right to issue injunctions against activities of employees or labor unions carried on for unlawful labor objectives as defined in state law, even if the industry involved in the proceeding ‘affects’ commerce, provided, of course, that the result does not collide with the policies of the Act.”

The same reason, that the Labor-Management Relations Act creates a special administrative remedy to protect new public rights and not to adjudicate private rights, excluding any implied state court jurisdiction to enforce the Labor-Management Relations Act, also sustains the continuing authority of state courts to adjudicate private rights under state law.

The great weight of persuasive authority in the many jurisdictions which have considered the issue here presented sustained the jurisdiction of state courts under state laws to decide cases and adjudicate private rights in traditional fields, such as contract and tort, whether or not the facts in issue between the parties amounted also to an unfair labor practice under the Labor-Management Relations Act, subject to the paramount power of the National Labor Relations Board to fashion remedies in the public interest, the state courts being bound, of course, to recognize rights guaranteed by the Labor-Management Relations Act: *Montgomery Building and Construction Trade Council, et al. v. Ledbetter Erection Co.*, 256 Ala. 678, 57 S. 2d 112, rehearing denied, 256 Ala. 689, 57 S. 2d 121, certiorari granted, 343 U.S. 962, petition for certiorari dismissed as improvidently granted, 343 U.S. —, 73 S. Ct. 196; *Russell v. International Union*, — Ala. —, 64 S. 2d 384, 391 392; *Lion Oil Co. v. Marsh*, — Ark. —, 249 S.W. 2d 569, 571; *Sommer v. Metal Trades Council, etc.*, — Cal. —, 254 P. 2d 559, 562-565; *Oil Workers etc. v. Superior Court*, 103 Cal. App. 2d 512, 230 P. 2d 71, 107-109; *Williams v. Cedartown Textiles*, 208 Ga. 659, 68 S.E. 2d 705, 708-709; *Thayer Co. v. Binnall*, 326 Mass. 467, 95 N.E. 2d 193, 201-202; *Way Baking Co. v. Teamsters, etc.*, 335 Mich. 478, 56 N.W. 2d 357, 365-366, certiorari denied — U.S. —, 73 S. Ct. 939; *Southern Bus Lines v. Amalgamated, etc.*, 205 Miss. 354, 38 S. 2d 765, 770; *Kincaid-Weber Motor Co. v. Quinn*, 362 Mo. 375, 241 S. W. 2d 886; *Rice and Holman, et al. v. United Electrical, etc. Workers, et al.*, 3 N.J. Super. 638, 65 A. 2d 258; *Bickford's, Inc. v. Mesevich*, 107 N.Y.S. 369, 372; *Art Steel Co. v. Velazquez*, 111

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N.Y.S. 2d 198, 201; *Erwin Mills, Inc. v. Textile Workers, etc., et al.*, 234 N. Car. 321, 67 S.E. 2d 372, 379; *General Electric Co. v. International Union, etc.*, 108 N.E. 2d 211, 218-221 (Ohio Court of Appeals); *Wortex Mills v. Textile Workers, etc.*, 369 Pa. 359, 363-364; *General Building Contractors Association v. Local, etc.*, 370 Pa. 73, 80-81; *International Molders, etc. v. Texas Foundries, Inc.*, 241 S.W. 213, 215-216 (Tex. Civ. App.) modifying trial court's temporary injunction, that temporary injunction being reaffirmed in *Texas Foundries v. International Molders, Inc., etc.*, — Tex. —, 248 S.W. 2d 460; *Truck Drivers etc. v. Whitefield Transportation*, — S.W. 2d — (Tex. Civ. App.), 23 Labor Cases (par. 67, 719); *United Construction Workers, et al. v. Laburnum Construction Corp.*, 194 Va. 872, 75 S.E. 2d 694, 698-700. Among the lower court decisions, there have come to our attention three rather close to the case at bar enjoining picketing for a purpose unlawful under state law: *Hall Steel Co. v. International Brotherhood of Teamsters, et al.*, 53 A.L.C. 132, 138-141, (Mich. Genesee County); *Winkelman Brothers Apparel, Inc. v. Local 299, etc.*, 52 A.L.C. 1153, 1160-1161 (Mich., Wayne County); *The Richman Brothers Co. v. Amalgamated, etc.*, 53 A.L.C. 831, 835 (Ohio, Cuyahoga County). We are impressed, in studying these cases where state courts adjudicate private rights in traditional fields of state law, that state courts continue to be indispensable tillers of these fields in maintaining rule of law. Even apart from the limits on effective federal administrative action, the spontaneously recognized practical necessity that justice be administered calls for continuing exercise by the forty-eight states of their "reserved power over coercive

conduct", *International Union v. Wisconsin Employment Relations Board*, 336 U.S. 245, 264.

Such persuasive precedent is in harmony with the decisions of the Supreme Court of the United States. Two contrary state court decisions, based upon a misapplication of the decisions of the Supreme Court of the United States, by the Pennsylvania Supreme Court in this case and by the Supreme Court of Minnesota in *Norris Grain Co. v. Nordaas*, 232 Minn. 91, 46 N.W. 2d 94, 100-102, 107, stand almost alone.

In their bearing upon the issue of state court jurisdiction under state law presented by this case, the ten decisions of the Supreme Court of the United States under the Labor Management Relations Act and the National Labor Relations Act drawing a necessary line, in the light of revelant congressional expression of intention, between federal and state power may be placed in three significant classes. Three decisions (considered under Point IV, *infra*), including the two most recent decisions, decide that basic rights conferred by federal labor legislation, including the rights conferred upon employees to bargain collectively through a representative of their own choosing and to engage in protected concerted activity cannot be frustrated or abrogated by state legislation: *Hill v. Florida*, 325 U.S. 538; *International Union, etc. v. O'Brien*, 339 U.S. 454; *Amalgamated Association, etc. v. Wisconsin Employment Relations Board*, 340 U.S. 383. Four cases (considered under Point III, *infra*), all involving state labor relations boards with broad-discretionary and policy-making authority designed to protect the same public interest, decide that the juris-

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diction of the National Labor Relations Board when exercised is paramount and when unexercised precludes state board action involving real potentials of conflict: *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197; *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767; *La Crosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U.S. 18; *Blankinson Packing Co. v. Wisconsin Employment Relations Board*, 338 U.S. 953. The remaining three cases (considered next in this Point II) significantly sustained even state labor relations board jurisdiction to apply remedies in the public interest against unfair practices which Congress had not made unfair practices: *Allen-Bradley Local No. 1111, v. Wisconsin Employment Relations Board*, 315 U.S. 740; *International Union v. Wisconsin Employment Relations Board*, 336 U.S. 245; *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301.

Language favorable to such state court jurisdiction appears in the three cases sustaining even the jurisdiction of policy-making state labor relations boards empowered with broad discretion to prevent unfair labor practices in the public interest. *Allen-Bradley Local No. 1111, etc. v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749, upholding the state board's order that the union cease certain picketing, threatening and obstructing, declared that:

"... authority of the several States may be exerted to control such conduct. Furthermore, this Court has long insisted that an 'intention of Congress to exclude states from exerting their police power must be clearly manifested'."

As further stated (at page 748, footnote 7, quoting S. Rep. No. 573, 74th Cong., 1st Sess., page 16. H. Rep. No. 1147, pages 16-17, containing identical language):

"The bill is not a mere police court measure. The remedies against such acts in the State and Federal courts and by the invocation of local police authorities are now adequate, as arrests and labor injunctions in industrial disputes through the country will attest."

Although it was regulation that was being upheld, it was concluded (at page 751) that:

"Since the state system of regulation, as construed and applied here, can be reconciled with the federal Act and since the two as focused in this case can consistently stand together, the order of the state Board must be sustained under the rule which has long obtained in this Court."

International Union, etc. v. Wisconsin Employment Relations Board, 336 U.S. 245, 265, 253, 254 permitting exercise, through a state labor relations board of

"... the state police power * * * over a subject normally within its exclusive power * * *" upheld the prevention of intermittent work stoppages and reiterated that:

"However, as to coercive tactics in labor controversies, we had said of the National Labor Relations Act what is equally true of the Labor Management Act of 1947, that 'Congress designedly left open an area for state control' and that 'the intention of Congress to exclude states from exerting their police power must be clearly mani-

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fested.' * * * In this case there was also evidence of considerable injury to property and intimidation of other employees by threats and no one questions the state's power to police coercion by those methods.

"It seems to us clear that this case falls within the rule announced in *Allen-Bradley* that the state may police these strike activities * * *"

Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, 336 U.S. 301, 305, 306, permitting a state agency or labor relations board to prevent, in the public interest, unfair labor practices not listed in Section 8 of the federal labor legislation, upheld a state board order reinstating, with back pay, an employee discriminatorily discharged and pointed out that:

"The States are free (apart from preemption by Congress) to characterize any wrong of any kind by an employer to an employee, whether statutorily created or known to the common law, as an 'unfair labor practice.' * * * So far as appears from the Committee Reports * * * § 10(a) was designed, as its language declares, merely to preclude conflict in the administration of remedies for the practices proscribed by § 8."

As we read the foregoing three decisions of the Supreme Court, *Allen-Bradley*, *Wisconsin Auto Workers and Algoma*, state court labor injunction jurisdiction under the police power continues (see also *Milk Wagon Drivers, etc. v. Meadowmoor Dairies*, 312 U.S. 287, 295,

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299-300, 318), even state labor relations boards can administer remedies where there will be no conflict in the administration of remedies with the paramount administrative authority of the National Labor Relations Board, and a fortiori, state courts may under valid state law adjudicate private rights, a field over which no authority has been delegated by Congress to the National Labor Relations Board.¹³

Precisely because Congress has not entered the field, Congress has not considered the perplexing problems as to where the lines would be drawn, as they would have to be, if there were some supersedure of state court jurisdiction. Paraphrasing Petro, Participation by the States in the Enforcement and Development of National Labor Policy, New York

¹³ The National Labor Relations Board, as *amicus curiae*, may repeat in this case its oft-repeated plea that it be permitted to do all the washing of all the dirty linen of unfair labor practices found on all the boys playing in its own backyard. The text supplies the answer; adjudication of private rights is not in the N.L.R.B. backyard. Moreover, Congress has been concerned that at times, if the N.L.R.B. spirit has been willing, the flesh has been weak, even if because of congressional short rations. The short rations at that have been quite sufficient in the wisdom of Congress for the preventive function in the national interest that Congress in its equalizing amendment deemed a sufficient assignment for the N.L.R.B. The point, in a relevant context, is well put in Senate Report No. 105 on S. 1126, page 23, Legislative History, etc., 429, that

"Any other course would engulf the Board with a vast number of petty cases that could best be settled by other means."

Congress has not seen fit to favor the bills that have been introduced to exclude neighborly state court jurisdiction on the other side of the N.L.R.B. backyard fence.

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University Fifth Annual Conference on Labor (1952), it is almost unthinkable, especially in view of a number of state court decisions upholding state court injunctions against union restraint of trade, *Carpenters, etc. v. Ritter's Cafe*, 315 U.S. 722, 724, 728; *Giboney v. Empire Storage, etc.*, 336 U.S. 490, 491, footnote 1, 497, to declare that such state court jurisdiction is precluded by the Labor Management Relations Act. Again, on the basis of the prima facie tort theory with the articulation of which the name of Holmes is so identified, a whole structure of common law for concerted labor action has been built. Is this structure to be torn down or arrested in its present stage and the jurisdiction of state courts blotted out simply because the Labor Management Relations Act has spoken—and consistently with the common law at that—on some phases?

As more briefly stated in the corresponding second section of the Summary of Argument, under this federal labor legislation, as under the Federal Trade Commission Act which was deliberately followed as a pattern therefor, Congress has delegated to the National Labor Relations Board the authority to adjudicate private rights and has not entered this field where state court jurisdiction thereof continues.

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POINT III

CONGRESS HAS NOT OCCUPIED THIS FIELD
AND THERE IS NO CONFLICT WITH AN
N.L.R.B. PARAMOUNT REMEDY

Petitioners' third alternative contention is that even if Congress has entered the field in issue, Congress has not occupied the field to the exclusion of the state court jurisdiction that was here exercised. As petitioners' second contention, that Congress had not entered the field, derives support from *Allen-Bradley, Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740; *International Union, etc. v. Wisconsin Employment Relations Board*, 336 U.S. 245 and *Algo-ma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 305, each involving an unfair labor practice which the National Labor Relations Board had not been empowered to prevent, so this third contention is based upon *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767; *La Crosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U.S. 18 and *Plankinton, Packing Co. v. Wisconsin Employment Relations Board*, 338 U.S. 953, as well as *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, cases where Congress had delegated to the National Labor Relations Board specific authority to handle the matters of representation or the unfair labor practices for which the states had also provided state labor relations boards and administrative procedures or remedies. Where Congress has entered a field (particu-

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larly where it has empowered an administrative agency to act as considered in the cases catalogued in *Bethlehem, supra*) there remains, as *California v. Zook*, 336 U.S. 725, shows so strikingly, the question how far Congress has occupied that field with resultant exclusion of state power.¹⁶

The field Congress entered should not in this case, for the reasons stated, be viewed in terms of a physical act but if it be said that Section 8(b) (2) constitutes an entry by Congress into the field of that unfair labor

¹⁶ A number of relevant cases have been collected in the first footnote under Point I, *supra*, with brief identification of the fields entered by the acts of Congress there considered, and a suggestion that the presumption may now be against the state in determining the extent of occupancy intended once Congress has entered the field. As we read *California v. Zook*, 336 U.S. 725, 731, 748-749, 740, all the justices were in agreement with the distinction taken by Mr. Justice Frankfurter (at page 740), which offers sufficient basis for a unanimous decision in this case that:

"Of course the same physical act may offend a State policy and another policy of the United States. Assaulting a United States marshal would offend a State's policy against street brawls, but, it may also be an obstruction to the administration of federal law. Scores of such instances, inevitable in a federal government, will readily suggest themselves. That was the kind of a situation presented by *United States v. Marigold*, 9 How. 560, 13 L. Ed. 257. Passing counterfeit currency may, in one aspect, be 'a private cheat practiced by one citizen of Ohio upon another,' and therefore invoke a State's concern in 'protecting her citizens against fraud,' 9 How. at pages 568, 569, 13 L. Ed. 257, but the same passing becomes of vital concern to the Federal Government because it tends to debase the currency."

So here the picketing may offend federal policy for protection of the free flow of interstate commerce, and at the same time offend against a vital policy that there be a remedy for tortious harm to the person thus picketed.

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practice; nevertheless Congress has not occupied the field to the exclusion of state court jurisdiction.¹⁷

State court jurisdiction in this case is not ousted by the fact that the Labor Management Relations Act empowers the National Labor Relations Board to proceed under Section 8(b) (2) against picketing for the unlawful purpose here involved on the ground that Section 8(b) (2) makes it an unfair labor practice for a labor organization to attempt to cause an employer to discriminate against an employee in violation of Section 8(a) (3) to encourage or discourage membership in any labor organization. While the trial court, under then-narrow decisions of the National Labor Relations Board (R. 186) such as *United Brotherhood of Carpenters and Joiners of America, etc.* (Wadsworth Building Co., Inc.), 81 N.L.R.B. 802, had held that the picketing was not outlawed by the Labor Management Relations Act, the decision of the Supreme Court of Pennsylvania that Section 8(b) (2) does apply to this picketing (R. 232) is sustained by the more recent progress in the decisions of the National Labor Relations Board toward the original congressional intention, *Denver Building Trade and Construction Trades Council* (Henry Shore), 90 N.L.R.B. 1768, 1769-1770, *Sub Grade Engineering Company*, 93

¹⁷ If Section 8(b) (2) had not applied, that ceiling on nationally conspicuous abuses did not by implication make right something less than a congress for the nation did not make wrong. The general approach of Congress, as pithily put in a different context in House Conference Report No. 510 on H. R. 3020, page 55, *Legislative History*, etc. 559, was that

"Rather the language covers the specific abuse which has come to the attention of Congress. It does not invite others."

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N.L.R.B. 406, 407-408, and Appendix B, *infra*. Whether this presents coincidence or potential conflict within the meaning of three decisions of the Supreme Court which will now be reviewed drops out of this case of state court jurisdiction since as we have seen (Point I, *supra*) Congress, in adding a public administrative remedy for outlawry of such unfair labor practices, intended that state courts continue to exercise jurisdiction under state law to adjudicate private rights.

In *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, an assertion by the New York State Labor Relations Board of jurisdiction, in representation proceedings, to certify foremen bargaining units contrary to an inconsistent policy for a time followed by the National Labor Relations Board was held to conflict with the National Labor Relations Act and the court's opinion, after an elaborate statement of principles for implying congressional intention not expressed in the pertinent Section 9 reasoned (at pages 775 and 776) that:

"State and Federal * * * governments have * * * delegated to an administrative authority a wide discretion in applying this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have in the

past. * * * But we do not think that a case by case test of federal supremacy is permissible here."

Similarly, in *La Crosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U.S. 18, 20, the certification by a state labor relations board of a rival union as collective bargaining representative for two departments in place of a long-recognized collective bargaining representative was set aside because on the basis of very real potentials of conflict it "conflicts with the National Labor Relations Act". Detailing the conflicting standards for federal and state board administrative discretion prescribed by the National Labor Relations Act and the Wisconsin Act for determining the appropriate bargaining representative or unit of representation and the additional measure of conflict in practical effect incident to informal administrative disposition of cases without formal order, the Supreme Court reaffirmed that:

"These are the very real potentials of conflict which lead us to allow supremacy to the federal scheme even though it has not yet been applied in any formal way to this particular employer * * * The uncertainty as to which board is master and how long it will remain such, can be as disruptive of peace between various factions as actual competition between two boards for supremacy. We are satisfied with the wisdom of the policy underlying the Bethlehem case and adhere to it."

On the authority of the foregoing two decisions the citation of which constituted the court's per curiam opinion, the jurisdiction of a state labor relations board

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over an employer unfair labor practice which was also an unfair labor practice under the National Labor Relations Act was denied in *Plankinton Packing Co. v. Wisconsin Employment Relations Board*, 338 U.S. 953. We set forth a brief statement from the two decisions below and the facts in appraising this cursory affirmation of settled principles. The Wisconsin Employment Relations Board by order of December 6, 1946, had ordered the reinstatement with back pay of an employee discharged because of pressure brought upon the employer by the union, when the employee had seasonably exercised his privilege of escape under a maintenance-of-membership contract. The union had secured that contract as the result of a National War Labor Board directive of February 20, 1945, providing for union security. Such discrimination in regard to tenure of employment to encourage membership in any labor organization was made an employer unfair labor practice both under Section 111.06 of the Wisconsin Employment Peace Act and by Section 8(3) of the National Labor Relations Act in substantially identical language. The National Labor Relations Board had assumed jurisdiction over the employer, a wholly-owned subsidiary of Swift & Company, by an order certifying the C.I.O. as a bargaining agent for the employee and reasserted that jurisdiction in July of 1945 when it entertained a petition by an A. F. of L. union for representative proceedings. The employee on March 6, 1945, effectively resigned from the C.I.O. union which had secured the maintenance-of-membership contract permitting escape before March 9, 1945. The Wisconsin Employment Relations Board found that as a result of the coercion of the C.I.O. union, and

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at its request, this employee was discharged on May 9, 1945, for the reason that he had exercised his right to refrain from membership in the C.I.O. union.

In *Wisconsin Employment Relations Board v. Plankinton Packing Company*, 23 LRRM, 2287, 2291, the Wisconsin Circuit Court for Milwaukee County dismissed a petition of the board for enforcement of its order of December 6, 1946, and held that the order was

"... void for the reason that the state board had no jurisdiction to make the same * * *"

The court relied primarily upon the *Bethlehem* case, supra, 330 U.S. 767, and added a suggestion that the power of the National Labor Relations Board to prevent employer unfair labor practices under Section 10(a) of the National Labor Relations Act in effect at the time of the state board order was at that time in terms "exclusive". Judge Klecvka said (23 LRRM at page 2290):

"Counsel for the company and the union rely upon the * * * cases of *Bethlehem Steel Co.* * * * and *Allegheny Ludlum Steel Corp.* * * *

"In the aforesaid cases the court held that comparison of the state and federal statutes showed that both federal and state governments have laid hold of the same relationship for regulation, and it involves the same employers and the same employees. Each has delegated to an administrative authority a wide discretion in applying this plan of regulation to specific cases, and they

are governed by somewhat different standards. Thus if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter. * * * "

In *Wisconsin Employment Board v. Plankinton Packing Co., et al.*, 255 Wis. 285, 38 N.W. 2d 688, 692, the Supreme Court of Wisconsin reversed with directions to enter judgment enforcing the provisions of the Board's order of December 6, 1946. The Wisconsin Supreme Court in its opinion of July 12, 1949, merely re-affirmed by reference its oft-expressed view that the Wisconsin Board could exercise jurisdiction until the National Board undertook to exercise jurisdiction in the same case. That case-by-case test for state administrative board jurisdiction had not been accepted in *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 305-306, when previously asserted in *Wisconsin Employment Relations Board v. Algoma Plywood & Veneer Co.*, 252 Wis. 549, 32 N.W. 2d 417, 421; and on still a prior occasion when the same view had been asserted in *Wisconsin Employment Relations Board v. La Crosse Telephone Corporation*, 251 Wis. 583, 30 N.W. 2d 241, it had been repudiated in *La Crosse Telephone Corporation v. Wisconsin Employment Relations Board*, 336 U.S. 18, 24.

Under these circumstances the employer's petition for writ of certiorari to the Supreme Court of Wisconsin was promptly granted on December 12, 1949, and reversal was swiftly accomplished in a very appropriate per curiam opinion of February 13, 1950, reading as follows:

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"The judgment is reversed. *Bethlehem Steel Co. v. New York State Relations Board*, 330 U.S. 767, 67 S. Ct. 1026, 91 L. Ed. 1234; *La Crosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U.S. 18, 69 S. Ct. 379."

In general in representation and unfair practice cases, involving discretionary action by state administrative policy-making agencies providing public remedies, where cases so often are settled without formal order on an administrative basis, somewhat different standards were provided.¹⁸

There was an intimate relation between the employer unfair practice in the *Plankinton* case and the sensitive matter of representation from which state labor relations board had been excluded in the *Bethlehem* and *La Crosse* cases, Congress had taken the particular subject matter in hand, there was a very real possibility in cases of the same type of state enforcement of a policy differently conceived, and under such circumstances coincidence was as ineffective as opposition to save such state regulations. A very different situation is here presented by a state court adjudication of private rights, a subject matter Congress had not taken in hand, under valid state law, where there

¹⁸ As noted in *Developments in the Law: The Taft-Hartley Act*, 64 *Harvard Law Review* 781, 786.

"The great bulk of unfair practice charges and representation petitions continue to be disposed of informally in the NLRB regional offices."

In one year informal disposition was made of 7,017 out of 9,245 representation cases and of 4,199 out of 4,664 unfair practice cases: 14th Ann. Rep. of NLRB, 164-166.

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was no conflict and no likelihood of conflict and a case-by-case test of federal supremacy is permissible.

In state board representation cases like *Bethlehem*, with their very real potentials of conflict, the courts have developed ample authority for the National Labor Relations Board, through injunctive proceedings in federal district courts to protect its jurisdiction: *National Labor Relations Board v. Industrial Commission of Utah*, 84 F. Supp. 593, 594, affirmed 172 F. 2d 389 (C. A. 10); *Food, etc. Workers v. Smiley*, 164 F. 2d 922 (C. A. 3). Since such injunctions were issued the Supreme Court of the United States clarified the exclusive jurisdiction over such representation proceedings of the National Labor Relations Board and there has been little repetition of such precedents.

The same procedure is available to the National Labor Relations Board to protect its paramount jurisdiction in the unlikely event of conflict between its public remedies and a state court proceeding to adjudicate private rights. The possibility of conflict between a restraining order of a state court, sustaining for example the validity of a bargaining agreement with one union, and obedience to a board order to bargain collectively with another union was presented in *National Labor Relations Board v. Grace Company*, 184 F. 2d 126 (C.A. 8) where it was suggested that:

"At least respondent was entitled to a reasonable time in which to secure a modification or dissolution of the State court order."

A search of the reported decisions discloses very few instances where the National Labor Relations Board

was constrained to enjoin state court proceedings, one such instance recently appearing in *Capital Service, Inc. v. National Labor Relations Board*, 204 F. 2d 848 (C.A. 9), where a federal district court granted a preliminary injunction against the enforcement by a bakery of a state court preliminary injunction in a consumer boycott case where the district court found it advisable to hold the situation in the status quo until the National Labor Relations Board determined whether it would consider an unfair labor practice charge against the unions previously filed by that bakery with the Regional Director of the Board. In the few such cases that have arisen, federal supremacy can be maintained by orders appropriate to the particular circumstances of the individual case.

At one time the Board thought it advisable, in *W. T. Carter and Brother*, 90 N.L.R.B. 2020, 2023-2024, in the case of an ex parte temporary restraining order in a Texas court (which in effect prohibited any union meetings, constituting "an abuse of legal process" in the majority's opinion) to:

"... view the Respondents' resort to court proceedings to prevent the union meetings, no less than the other devices they employed for that purpose, as ~~an~~ unfair labor practice."

Dissenting as to that, Chairman Herzog, 90 N.L.R.B., at page 2029, expressed his opinion that:

"... it seems to me that this Board should accommodate its enforcement of the statute to the traditional right of all to bring their contentions to the attention of a judicial forum, rather than

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hold it to be an unfair labor practice for them to attempt to do so."

Chairman Herzog noted that it might well be that in granting such a relief a court would be acting inconsistently with governing Federal law and that of course the Board was not powerless to assert paramount Federal authority directly when such action was taken by a state court. Senator Taft thereafter called this *Carter* case to the attention of the Senate, 97 Cong. Rec. 6064, as illustrating the length to which the Board was going to find employers guilty of unfair labor practices. More recently, in *Texas Foundries, Inc.*, 100 N.L.R.B. No. 249, 31 LRRM 1224, 1226, where the general counsel and the union sought to hold the employer accountable for an unfair labor practice for allegedly invoking the process of the state court in bad faith for the purpose of stopping a strike, the Board held:

"The argument that the state court was without jurisdiction is based on the premise that Congress has vested in the Board and in the federal courts the exclusive power to regulate strikes, thereby denying state courts of jurisdiction. As applied to the particular facts of this case, this basic premise is invalid. The injunction obtained by the employer was aimed not at the right to strike, a subject beyond state regulation where interstate commerce is involved, but at the methods, alleged to be illegal under state law, by which it was claimed the strike was being conducted. Decisions of the United States Supreme Court have made clear that the NLRB does not preclude states

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from exercising their traditional police power and injunctive control over unlawful conduct that may be committed during the course of a strike or labor dispute."

Accordingly the Board held that the state court had jurisdiction and that there was not sufficient basis for finding that the state court process was invoked maliciously and in bad faith.

Such cases are far and few between and the National Board's powers are adequate to prevent abuse and to protect its paramount authority when the public interest requires that it be exercised in a case where the jurisdiction of a state court has already been invoked under state law.

The chief reliance in such cases, as has already appeared from the results of a congressional investigation of state labor injunctions, must be in the enlightened self-restraint of state courts. Should any alleged abuse be brought to the attention of the Board in some isolated case, ample authority exists to protect the federal supremacy on a case-by-case basis. The Supreme Court, in the light of the broad experience of its own members, should find no real potential of conflict in such cases where both state courts and the National Board have jurisdiction to provide remedies, for different purposes, under state laws and the National Labor Relations Act respectively which unite in their outlawry, for such different purposes, of the same conduct.

Theoretically, the National Labor Relations Board, had it seen fit to exercise jurisdiction here, might have

made different findings of fact than the Pennsylvania court and therefore might have reached a different conclusion. As observed in Cox and Seidman, *Federalism and Labor Relations*, 64 *Harvard Law Review* 220,

"This risk, however, is so familiar an aspect of our legal system and is also a matter of such small moment . . ."

that state jurisdiction cannot be superseded on that ground. Congress has created the same risk in the boycott cases which the Board is empowered by Section 10 to determine under Section 8(b) (4) while Section 303 authorizes independent damage suits by one injured thereby in any court having jurisdiction of the parties.

In this case, in the absence of conflict, where the National Labor Relations Board has taken no action whatsoever under its paramount power to prevent unfair labor practices, the state court could properly adjudicate the private rights of the parties under state law.¹⁹

¹⁹ Congress has indicated also, in the legislative history collected under Point I, that it did not occupy the field to the extent of excluding state courts. Note also that Hon. Francis Case presented comparable testimony, (1947) Hearings before House Committee on Education and Labor, 80th Cong., 1st Sess., page 140,

"* * * there is no prohibition in the bill against the individual employer seeking to get relief under the State laws * * *"

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POINT IV

NO RIGHTS GUARANTEED BY THE LABOR MANAGEMENT RELATIONS ACT, WHICH IS BINDING ON STATE JUDGES, WERE IMPAIRED

In exercising its jurisdiction under state law to adjudicate private rights, a state court is bound to recognize the Labor Management Relations Act as the supreme law of the land. The familiar provisions of Article VI of the Constitution of the United States constitute all laws of the United States, such as the Labor Management Relations Act, made in pursuance thereof, the supreme law of the land and the judges in every state are bound thereby, anything in the laws of any state to the contrary notwithstanding. In this case there was nothing in the state law contrary to the rights guaranteed in Section 7 of the Labor Management Relations Act.

Three decisions of the Supreme Court of the United States have struck down state statutes contrary to the rights guaranteed in Section 7. In *Hill v. Florida*, 325 U.S. 538, 542, a state regulation of the licensing of business agents of unions subject to the National Labor Relations Act was held to be in conflict with that act because the state law interfered with the freedom of collective bargaining guaranteed by Section 7, and Mr. Justice Black, for the court, stated that:

"The collective bargaining which Congress has authorized contemplates two parties free to bargain, and cannot thus be frustrated by state legislation."

In *International Union, etc. v. O'Brien*, 339 U.S. 454, 457, 458, a state Labor Mediation Law making provision for a strike notice and requiring that any strike must first be authorized by majority vote of the employees in a bargaining unit required by state regulations was held unconstitutional on two grounds:

"Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike. It qualified and regulated that right in the 1947 Act. * * * None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation. * * *

* * * The federal Act thus permits strikes at a different and usually earlier time than the Michigan laws; and it does not require majority authorization for any strike. * * *

"Finally, the bargaining unit established in accordance with federal law may be inconsistent with that required by state regulation. Though the unit for the Michigan strike vote cannot extend beyond the State's borders, the unit for which appellant union is the federally certified bargaining representatives includes Chrysler's plants in California and Indiana as well as Michigan. * * * Without question, the Michigan provision conflicts with the exercise of federally protected rights."²⁰

²⁰ In *O'Brien*, 339 U.S. 454, at page 457, footnote 3, and again in *Amalgamated*, 340 U.S. 383, 395, footnote 21, the Supreme Court relied on a statement, 93 Cong. Rec. 3835, by Senator

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Again, in *Amalgamated, etc. v. Wisconsin Relations Board*, 340 U.S. 383, 395-396, 398, finding "direct conflict" as to the duration and scope of collective bargaining, shortened and narrowed by the state statute, the Supreme Court held that the Wisconsin Public Utility Anti-Strike Law "conflicts" with the regulation by the Labor-Management Relations Act of 1947 of peaceful strikes for higher wages and Mr. Chief Justice Vinson for the court explained:

"Taft that 'We recognize freedom to strike when the question involved is the improvement of wages, hours and working conditions, when a contract has expired and neither side is bound by a contract.'"

The strikes in both cases were for higher wages and lawful purposes. Even so, Senator Taft said of *Amalgamated*, the Wisconsin case, in (1953) Hearings before the Senate Committee on Labor and Public Welfare, 83rd Cong., 1st Sess., page 607,

"It must have been conditioned in some way . . . I thought they misconstrued my remarks in the Wisconsin case."

The immediate context, i.e.,

"When . . . neither side is bound by a contract," of Senator Taft's recognition of "freedom to strike" shows that it was conditioned on a lawful purpose and lawful means. At other points in LMRA legislative history, Senator Taft conditioned a worker's freedom to strike, in express language, e.g.,

" . . . if he does not violate the local laws",

(1947) Hearings before the Senate Committee on Labor and Public Welfare, on S. 55, etc., 80th Cong., 1st Sess., p. 1257. That qualification has been recognized where pertinent, by the Supreme Court, e.g., in *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U. S. 746, 750, and *International Union, etc. v. Wisconsin Employment Relations Board*, 336 U.S. 245, 247-258, 259-260, 263-264 ("What . . . state laws might do is not . . . regulated"). Furthermore, status of workers is not at issue in the present case of stranger picketing for an unlawful purpose.

"Michigan, in *O'Brien*, sought to impose conditions upon the right to strike and now Wisconsin seeks to abrogate that right altogether insofar as petitioners are concerned. * * *

"It would be sufficient to state that the Wisconsin Act, in forbidding peaceful strikes for higher wages in industries covered by the Federal Act, has forbidden the exercise of rights protected by § 7 of the Federal Act. In addition, it is not difficult to visualize situations in which application of the Wisconsin Act would work at cross-purposes with other policies of the National Act."

No such conflict with the exercise of federally-protected rights is here presented. In *Amalgamated, etc. v. Wisconsin Employment Relations Board*, 340 U.S. 383, 390, in footnote 12, Mr. Chief Justice Vinson expressly noted that:

"Section 7 of the Labor-Management Relations Act not only guarantees the right of self-organization and the right to strike, but also guarantees to individual employees the 'right to refrain from any or all of such activities', at least in the absence of a union shop or similar contractual arrangement applicable to the individual."

In adjudicating private rights, over which the National Labor Relations Board was given no jurisdiction, the state court properly applied state law, which, far from conflicting with any rights guaranteed by Section 7 to engage in concerted activities was wholly in harmony with the "right to refrain" expressly guaranteed as an important addition by the Labor-Management.

Relations Act in Section 7. Under the provisions of Section 7 of the National Labor Relations Act, the courts had firmly established the rule that employees were not given any right to engage in unlawful or other improper conduct and *International Union, etc. v. Wisconsin Employment Relations Board*, 336 U.S. 245, 261-263 and footnote 15, made it very plain that, under the Labor Management Relations Act, in the light of its legislative history,

“* * * obviously persons who engage in or support unfair labor practices will not enjoy immunity under the act.”

In adding the express “right to refrain” in Section 7, the Labor Management Relations Act has further delimited the kinds of concerted activities which are protected by Section 7. As pointed out in the House Conference Report No. 510, page 39, 93 Cong. Rec. 6372, Legislative History 543, quoted at length in the *Wisconsin Auto Workers* case, 336 U.S. 245, 260, note 15, *supra*, as well as in Senator Taft’s summary of the principal differences between the conference agreement and the bill which the Senate passed, Legislative History, page 1539:

“* * * in the declaration of policy to the amended National Labor Relations Act adopted by the conference committee, it is stated in the new paragraph dealing with improper practices of labor organizations, their officers, and members, that the ‘elimination of such practices is a necessary condition to the assurance of the rights here-in guaranteed.’ This in and of itself demonstrates

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a clear intention that these undesirable concerted activities are not to have any protection under the act * * *

Even without such additional specific language, there was always implicit in Section 7 of the National Labor Relations Act the right to refrain from concerted activities. That was made very clear by Senators Wagner, Borah and Walsh in the debates on the National Labor Relations Act. 79 Cong. Rec. 7569, 7570, 7571, 7630, 7638 and 7661. Senator Wagner stated (at page 7571) that:

"It does not ever imply that any employee can be forced to join a union, except through the traditional method of a closed-shop agreement with the employer."

Senator Borah stated, at page 7650, that:

"I want to see the working man free to join a union or to remain out of a union."

²¹ The importance of this right to refrain was emphasized in the Conference Committee Report, as we have seen, and throughout the legislative history which may profitably be traced as far as the Hearings before the Committee on Labor and Public Welfare of the United States Senate, 80th Congress, 1st Session, on S. 55 and S. J. Res. 22, pages 1002 and 1497. Senator Ball drew from William Green, of the American Federation of Labor an explicit statement:

"Mr. Green. Nobody is going to interfere with the exercise of that right. He can belong to a union or he can stay out of a union." (page 1003)

Senator Ball was much concerned that,

"The unfair banner line has been used to organize employees against their will to a tremendous extent in this country." (page 1497)

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Senator Walsh, the committee chairman, in explaining the bill, stated, at page 7658, that:

"First of all, it does not require or request any employee to join any organization * * *"

The National Labor Relations Board from the beginning recognized that the right to refrain from concerted activities was implicit in Section 7 of the National Labor Relations Act of 1935: *National Electric Products Corp.*, 3 N.L.R.B. 475, 499; *Borg-Warner Corporation*, 44 N.L.R.B. 105, 116; *Pittsburgh Plate Glass Co.*, 66 N.L.R.B. 1083, 1092, 1094-1095.²²

²² In *National Electric Products Corp.*, 3 N.L.R.B. 475, 499 the employer threatened to deduct from the wages a sum equivalent to current Brotherhood dues, thereby encouraging membership in the Brotherhood and the Board said:

"The respondent did not permit its employees freely to make their own choice, as the law of the land requires."

In *Borg-Warner Corp.*, 44 N.L.R.B. 105, 116, failing to find that there was, as the union asserted, an oral secret side agreement that the company would "take care of" any employee who failed to become or remain a member of the union, the Board did find that the company did "take care of" certain employees and held that " * * * respondent thereby unlawfully encouraged membership in the Union. * * * thereby * * * restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act."

In *Pittsburgh Plate Glass Co.*, 66 N.L.R.B., 1083, 1094-1095, where the employer's plan of cooperation with a C.I.O. union lacked sufficient certainty, in the opinion of a majority of the Board, to protect it under the proviso to Section 8(3), the Board said:

" * * * we find that the respondent * * * by urging, persuading and warning its employees to join the U.M.W. * * * restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

Argument

Senator Taft, in his supplementary analysis of the Labor Management Relations Act, 93 Cong. Rec. 6859, Legislative History, etc. 1623, as an expression of legislative intent, concurred in that construction of Section 7 and explained the explicit reference to "the right to refrain" as follows:

"Section 7. In this section guaranteeing the right of employees to self-organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, there has been inserted the language 'and shall also have the right to refrain from any and all of such activities * * *.' * * * There is similar language in the Norris-LaGuardia Act * * * Moreover, the Board itself has held that a right to refrain from the exercise of the rights guaranteed in section 7 was always implicit in the Wagner Act (See Pittsburgh Plate Glass Co., 66 NLRB

Chairman Mills took no part in the Berg-Warner case but Mills and Brown, From the Wagner Act to Taft-Hartley (University of Chicago Press, 1950) at page 320, later revealed concurrence in this construction of Section 7 and states that

"Wisconsin and Minnesota 'specified what was always implicit—the right to refrain from concerted activity.'"

See also *Allen-Bradley Local No. 1111, etc. v. Wisconsin Employment Relations Board*, 315 U.S. 740, 741 (footnote 1) and 750, where the Supreme Court noticed the "right to refrain" expressed in the Wisconsin Act and said of Section 7 of the National Labor Relations Act that:

"And we fail to see how the inability to use mass picketing, threats, violence, and the other devices which were here employed impairs, diminishes, qualifies, or in any respect subtracts from any of the rights guaranteed and protected by the federal Act."

1083.) The new language therefore, merely makes mandatory an interpretation which the Board itself had already arrived at administratively."

The Supreme Court of Pennsylvania arrived judicially at the same construction of its Labor Relations Act which had enacted verbatim the provisions of Section 7 of the National Labor Relations Act of 1935. Section 5 of the Pennsylvania Labor Relations Act of June 1, 1937, P. L. 1168, 1172 (43 Purdon's Statutes, Section 211.5) provides that:

"Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

That Section 5 of the Pennsylvania Labor Relations Act of 1937, following exactly the wording of Section 7 of the National Labor Relations Act of 1935, was authoritatively construed in *Wilbank et. al. v. Chester, etc. Bartenders, etc.*, 360 Pa. 48, 52, certiorari denied, 336 U.S. 945, where a majority of plaintiffs' employees had not joined a labor organization; the Supreme Court of Pennsylvania said:

"They seem to prefer to exercise the right of not joining any union, a right which is protected by section 5 of the Pennsylvania Labor Relations Act of 1937 * * *

"Defendants' purpose in picketing was to require plaintiffs to force their employees to join the union or to discharge them and employ

others who are members of the union. Such a purpose is clearly unlawful * * *

The public policy of Pennsylvania applicable to this case is thus identical with Congressional policy and is an important and widely-accepted one. As stated in the 1950 Annual Survey of American Law, 389-390,

"If the picketing is not stopped, and if the employer wants to stay in business, he must inevitably do what he can to induce his reluctant employees to join the union. * * * it is flatly inconsistent with the modern labor relations principle, which hinges representative status on uncoerced majority standing."

That principle of employee free choice is recognized in many jurisdictions, some recent illustrations being found in *Blue Boar Cafeteria Co. v. Hotel and Restaurant Employees, etc.* — Ky. —, 254 S.W. 2d 335, 339; *Way Baking Co. v. Teamsters, etc.*, 335 Mich. 478, 56 N.W. 2d 357, 361-363, certiorari denied — U.S. —, 73 S. Ct. 939; *Hagen v. Culinary Workers, etc.*, — Wyo. —, 246 P. 2d 778, 785-788. Many states have also adopted labor anti-injunction acts, along the line of the Norris-LaGuardia Act, and the Pennsylvania Anti-Injunction Act of June 2, 1937, P. L. 1198 (43 Purdon's Statutes, section 206-b) in Section 2(a) similarly declares the public policy that a worker shall have full freedom of association and that

"* * * he should be free to decline to associate with his fellows * * *"

Argument

In *Building Service Employees, etc. v. Gazzam*, 339 U.S. 532, 538, 540-541, the Supreme Court recognized the importance of this public policy and said:

"Under the so-enunciated public policy of Washington, it is clear that workers shall be free to join or not to join a union, and that they shall be free from the coercion, interference, or restraint of employers of labor in the designation of their representatives for collective bargaining. Picketing of an employer to compel him to coerce his employees' choice of a bargaining representative is an attempt to induce a transgression of this policy, and the State here restrained the advocates of such transgression from further action with like aim. * * * That State policy guarantees workers free choice of representatives for bargaining purposes. * * * free choice as to whether they wish to organize or what union would be their representative.

"The public policy of Washington relied upon by the courts below to sustain this injunction is an important and widely accepted one."

No federal right, therefore, was impaired when the state court concluded that the picketing in this case would, if allowed, result in coercing Central to resort to compulsion to force its employees to join the Teamsters in violation of that state policy protecting employees' free choice. There is nothing in the state law and important state public policy applicable to this case contrary to Section 7 of the Labor Management Relations Act (see also Appendix B, *infra*). Suf-

Argument

It is to say that the basic rights guaranteed in Section 7 and in the Labor Management Relations Act constitute the supreme law of the land and under Article VI of the Constitution of the United States the judges in every state shall be bound thereby. Section 7 of the Labor Management Relations Act thus provides a rule of decision, rather than a pre-emption, so far as concerns the jurisdiction of the state courts to adjudicate private rights under state law. The state law in this case is not contrary to the Labor Management Relations Act. No rights guaranteed by the Labor Management Relations Act were impaired.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed. The question presented should be answered in the negative. The Labor Management Relations Act of 1947 does not oust the jurisdiction of a state court, in adjudicating private rights, to enjoin picketing for the purpose of coercing an employer to compel its employees to become members of the picketing union, where the decision was based upon state legislation which made that purpose unlawful. The state statute guarantees workers free choice of representatives for bargaining purposes. Concerted activity for that unlawful purpose was not privileged and the state court had jurisdiction, where very substantial harm was intentionally inflicted, to adjudicate Central's private

Argument

common law right. The National Labor Relations Board has not exercised its discretionary jurisdiction, in the public interest, to prevent such tortious conduct as an unfair labor practice also outlawed by Section 8(b)(2). In Section 10 of the Labor Management Relations Act Congress did not authorize the National Labor Relations Board to adjudicate private rights and did not take in hand that subject wisely left to the insulated laboratories of the forty-eight states. Subject to the paramount authority of the National Labor Relations Board, in the unlikely event of conflict between public and private remedies, and subject to the rights guaranteed by Section 7 binding as supreme law upon state judges, the Congress expressed its deliberate choice and consent, illuminated by the legislative history, that state courts should continue their indispensable function of adjudicating under state law our precious American heritage of private rights.

Respectfully submitted,

JAMES H. BOOSER,

DAVID S. KOHN,

Counsel for Petitioners.

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APPENDIX A

THE PURPOSE OF TEAMSTERS' PICKETING

Summary of some supporting evidence, Teamster argument as to coercion of employees considered

We summarize, in the following sixteen numbered paragraphs, some of the supporting evidence that, as the state court reasonably found, the purpose of the picketing was to organize from the top.

(1) Any "advertising" on the placards of the pickets was not addressed to Central's employees (R. 18 and 21, Central's Exhibit No. 1, finding 16 at R. 174). The signs did not say "Employees of Central * * * join Local 776", etc. The signs stated no facts to persuade or inform the employees. The signs announced a demand, stating what it was that "Local 776 * * * wants * * *". That demand, in harmony with surrounding facts, was for the employer, in this case Central. Central was plainly notified that "Local 776 * * * wants Employees of Central * * * to join * * *".

(2) Basic demands, in the background of this picketing, addressed by the Teamsters to Central (cf. R. 64), included prior requests to Central's owner (R. 150) "To ask him to or-

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ganize" and (R. 40) "to join in with them, get my men to join up with them." Central has consistently adhered to a hands-off policy (R. 25 and 40, findings 11 and 12 at R. 173), not objecting to any of its employees joining, but refusing to put any pressure on its employees to join the Teamsters.

(3) Continuity of purpose in the long campaign of the Teamsters against Central is clear. Alan Kline, business agent of the Teamsters for more than a decade (R. 114 and 150), conceded on cross examination (R. 138) that "We have been continually attempting to organize them" and that (R. 147) he couldn't get Central's drivers to join Teamsters.

(4) Domination of Central's connecting carriers by the Teamsters has been demonstrated. Local 776, with "approximately 400" (R. 115) members, and similar Teamster locals in Reading, Lancaster and other related areas (R. 97 and 162) have the strongest legal form of union security contracts with a dozen and more over-the-road common carriers by motor vehicle (R. 27-28, 48, 76 and 81, cf. R. 95) that had for many years used Central in Harrisburg (R. 21, 22, 44, 46 and 47, findings 3, 4, 24 at R. 176) for their local deliveries. The Teamsters, while no longer able to require closed-shop contracts, under Section 8(a) (3) of the Federal Labor Management Relations Act, had uniformly secured union shop contracts requiring that employees hired by such carriers must, within 30 days, join the Teamsters (R. 129,

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see R. 160 and 165, finding 23 at R. 178) and must as a condition of employment maintain good standing in the union. These contracts provided that the connecting carriers could not require their men to go through a picket line (R. 76, 92 and 93, finding 31 at R. 177).

(5) Embarrassment of the pickets (R. 43 and 47) was given as the reason why connecting carriers must no longer do business with Central. Obviously the pickets didn't understand that they were appealing to Central's employees or to their reason and intelligence. They were aiming at Central at a vulnerable, sensitive spot, Central's traffic of a quarter of a million pounds of freight a day handled in connection with unionized over-the-road carriers. If Central's employees ignored them, that meant nothing to the pickets. If Central's connecting carriers had continued to do business with Central, then the pickets would have been embarrassed.

(6) Failure to make known any freedom to cross the picket line (R. 43, 47, 53, 54, 55, 56 and 57) gives rise to a very strong inference that the Teamsters intended to put pressure on Central so long as its men did not join the Teamsters. Drivers approaching the picket line could so easily have been advised that it was all right to pass, that they could, without embarrassing the pickets, do business as usual with Central. The pickets would still have been advertising to Central's men, had that been their fundamental function. But

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the pickets did not besoon to anyone to pass them, they did not lift a finger.

(7) The general organizing campaign, to increase the economic strength of the local union, of which this picketing was a part (R. 73, 74, 80, 85 and 97), discloses the unmistakable objective of the Teamsters, in this Battle of the Bulge to envelope Harshburg's remaining four or five non-union carriers. The Teamsters were concerned with something other than persuading nine Central drivers (making a majority, with four who joined a decade ago, of the twenty-four eligible employees); they wanted to strengthen their monopoly hold on transportation labor. They also picketed little Hill Express to put its four employees in the union, but soon withdrew, explaining (R. 75) they "didn't have the manpower * * *". Central was more vulnerable and potentially profitable, and pressure on this employer by pickets was continued in the familiar pattern of a general organizing campaign by the Teamsters (See Appendix B, *infra*).

(8) Home-to-home solicitation for memberships was not attempted by the Teamsters (R. 82, 88 and 123). The excuse given, not found credible, was that, notwithstanding a membership of over 400 men, the Teamsters "didn't have the personnel necessary" (R. 123) to visit from nine to twenty Central men. The same excuse, that the Teamsters "didn't have the manpower" (R. 75) was given as previously noted for withdrawing

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pickets from Hill Express which had four employees. The Teamsters just did not contact Central's employees in an effort to have them become members (R. 75, 91, cf. R. 155 and 156, finding 26 at R. 176-177).

(9) Injury to Central from the picketing was extensive. Central lost a quarter of a million pounds of freight per day (R. 26-27, finding 25 at R. 176). The Teamsters hit to hurt. They aimed a knock-out blow. They connected with Central's chin of custom. They paralyzed (R. 26) Central's business. The over-the-road carriers, all in the Teamster fold, ceased doing business with Central. The Teamsters pretended to see no injury, the business agent saying (R. 91) "I don't realize how it could greatly damage," (R. 25) "I don't think any harm is coming to you," (R. 26) "I don't see any harm from this." The plainly intended and necessary result of the picketing as conducted was the loss by Central of hundreds of dollars a day.

(10) Joining of the Teamsters by none of Central's employees during the period of the picketing (R. 83, 151 and 155), or during the preceding decade, further evidences the lack of appeal by the Teamsters to the men. The Teamsters had nothing definite to offer the men, whose wages were above the union scale (R. 39-40, finding 14 at R. 173). The Teamsters must have known (cf. R. 138) from experience that the men weren't interested. The Teamsters couldn't get the drivers for Central to join (R. 147).

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(11) Knowledge on the part of the Teamsters of the extent of the injury resulting to Central from the picketing is indisputable (R. 25, 26 and 39, findings 20, 21, 22, 35, 38 at R. 175-176, 178). The Teamsters failed to comply with Central's request that they correct a situation which it was in their power to correct if they were not aiming at Central.

(12) A letter was sent by the Teamsters to related teamster locals, at Reading, Lancaster, and other central Pennsylvania cities, on June 1, 1949, in anticipation of this organizing campaign against Central and other local dray and freight carriers (R. 97). It advised that this would not create the usual strike situation. The purpose of the letter was to eliminate reference of the matter to and approval by the Joint Council, in view of Article XII, Section 1, paragraph (c) of the controlling Constitution of the International Brotherhood of Teamsters (R. 140, 143 and 154). The business agent or secretary-treasurer of each such local in due course received the letter and was cautioned not to "misunderstand" (R. 100-101). There was no time for the members generally to know of it and the usual willingness to lend a helping hand in any situation was recognized (R. 98). The usual orders (R. 53), "don't cross" the picket line, followed.

(13) Members were neither consulted nor advised by Teamsters' business agent as to this action against Central. The members had met the

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second Sunday in May (R. 152) and there was no discussion or mention of the matter (R. 140, 152). The campaign was thereafter formulated in the latter part of May (R. 75). It was a Business Agent brain child (R. 140 and 154-155). Neither the Teamsters' lawyer (R. 153), nor the Joint Council (R. 143), nor the members were consulted. The business agent said that he could not instruct his men not to cross the picket line (R. 47). Receiving no instructions to the contrary, the members did not cross the picket line (R. 55, 57 and 56, findings 24 and 30 at R. 176, 177).

(14) No instructions were given to the pickets (R. 39, finding 22 at R. 176). They were paid pickets, not truck drivers and not Central employees (R. 75 and 85). Such a picket, when asked "Is this a picket line?" answered in the affirmative (R. 53). The pickets talked to drivers of connecting carriers who approached the picket line, and the drivers pulled away without delivering their freight intended for Central (R. 29). The pickets invoked the well established labor union practice (R. 28, 44, 47, 55, 56, 57, 93 and 95, findings 24 and 30 at R. 176, 177) not to cross a picket line, and would have been embarrassed (R. 43 and 47) by non-cooperation since they had no contrary instructions.

(15) One object was claimed by the Teamsters. In anticipation of this organizing campaign, they advised affiliated locals that "the object * * * is to enroll among our membership the truck drivers, helpers or warehousemen em-

ployed by" Central (R. 97). President and business agent Long testified that "the purpose" was to get them to join the union (R. 74). Secretary-treasurer and business agent Kline testified that it was an appeal to Central's employees to join the union (R. 89). Both were asked by their counsel the identical question "Are you picketing for any other purpose?" (R. 73 and 89) and both gave verbally identical answers (R. 73 and 89), "No, none whatsoever." If the "none whatsoever" answers were disbelieved by the Chancellor who saw and heard the witnesses, as they were, then the claimed purpose even if believed, was entirely consistent with the co-existence of a second traditionally-related purpose of conscripting the employer, Central, to get the men to join. Who got the men to join was secondary, and the employer was the only remaining practical means, after a decade of fruitless effort. To get the men to join was an admitted object.

(16) The place picketed was not Central's main office, but a Reading platform or terminal a mile distant (R. 1st and 21, findings 1 and 2 at R. 171). To that platform came some fifteen Teamster-organized over-the-road carriers that for years had used Central as pickup and delivery carrier for a quarter million pounds of freight daily (R. 21, 22 and 27, findings 3, 4, 24, 34, 38 at R. 171, 176, 178). The reasons given for the choice of the place picketed were contradictory and not credible. Business Agent Kline testified (R. 89) "I didn't want to carry the impression that we were including the organization to office

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workers." Business Agent Long (R. 78) testified on the contrary that "when we wanted to establish the picket line we took the telephone directory." But the telephone directory since April of 1949 had listed (R. 86) the main office. Kline conceded that he was told (R. 90) that Central's owner "was at" the place picketed and the employer (R. 21 and 39) "saw these * * * signs" as planned.

It may not be amiss to add that at the final hearing counsel for Teamsters himself volunteered the statement of record (R. 151) that "The employees were anti-union."

The object of the picketing, under the circumstances appearing in this record and the findings of the trial court, was transparently not vain repetition of fruitless efforts to convince some twenty local dray drivers who had long since decided that the Teamsters had nothing attractive to offer them: See *Huber & Fink, Inc. v. Jones*, 98 N.Y.S. 2d 393, 397, 398 ("* * * the object of the picketing is transparently not to persuade employees"). The Teamsters have suggested (at page 19 of their printed brief before the Supreme Court of Pennsylvania) that it was "equally plausible" that "Defendant may have been seeking to coerce the employees to join the Union." It has, of course, been true in many cases, as noted in *N.L.R.B. v. International Rice Milling Company*, 341 U.S. 665, 671, that

"The picketing was directed at the * * * employees and their employer in a manner traditional in labor disputes."

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Were the purpose thus suggested lawful and one of the purposes of the picketing, still the fact that one of several purposes is lawful would be irrelevant because as recognized in Restatement, Torts, Section 79C, and reiterated by the National Labor Relations Board in *Medford Building & Construction Trades Council*, 96 NLRB 165, 166,

"* * * it is settled law that picketing in furtherance of both a lawful and unlawful objective is unlawful."

Besides the lawfulness of any such additional purposes to coerce employees is not sustained by the Teamsters' reliance on *Building Service Employees International Union v. Gassam*, 339 U.S. 532, 539-540, in effect affirming 29 Wash. (2d) 488, 88 P. 2d 97, 11 A.L.R. 2d 1330, where the Washington statute under consideration, as Mr. Justice Minton expressly states,

"* * * only prohibits coercion of workers by employers."

See also Petro, Free Speech and Organizational Picketing in, 1952, 4 Labor Law Journal 3, 7-8. Quite a different situation is presented in Pennsylvania where Section 6(2) of the Act of July 7, 1947, P. L. 1445, 1447 (43 PS, Section 211.6) makes it an unfair labor practice and hence an unlawful objective (Restatement, Torts, Section 794) for a labor organization to intimidate, restrain

"* * * or coerce any employe for the purpose and with the intent of compelling such em-

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ploye to join or to refrain from joining any labor organization * * *

In any event it would not be sufficient to show that picketing was directed at the employee where any such purpose, if established, was quite consistent with the co-existence of a purpose also to direct the picketing at the employer; when the Teamster officials testified that the picketing was directed at the employees and denied, *ipseissima verba*, that there was any other purpose whatsoever for the picketing, the verbally identical "none whatsoever" (R. 73 and 89) answers of these witnesses whom the Chancellor saw and heard were not believed by the state court.

APPENDIX B

ORGANIZING FROM THE TOP

Organizing from the top, the purpose of the picketing in this case, is a perverse but persistent practice of a few unions that seek to add to their numerical membership by coercing employers to force their employees to join a union they do not choose to join. Congress has had occasion to notice with disapproval this undemocratic coercive practice of organizing through employers whose business life the union threatens to throttle through tied-up truck transportation, a typical Teamster tactic. That means in the wisdom of Congress, is not justified by the end. The employees are to be organized, if at all, through voluntary exercise of their fundamental right of free choice declared in Section 7 of the Labor Management Relations Act. The Labor Management Relations Act, with its legislative history in 1947, and its continuing story through the 1953 congressional hearings, supports the state law under which the state court reached a sound judgment in the exercise of jurisdiction in accordance with the intent of Congress.

As summarized in the scholarly text of Millis and Brown, *From the Wagner Act to Taft-Hartley*, 246, 247, 649:

"The Taft Report [Senate Report No. 105, 80th Cong., 1st Sess., page 2] in 1947 spoke of

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'the one-sided character of the Act itself, which, while affording relief to employees and labor organizations for certain undesirable practices on the part of management, denies to management any redress for equally undesirable actions on the part of labor organizations.' * * * coercion by employers was outlawed, while the [National Labor Relations] Act did nothing about coercion, intimidation, and violence by unions in organizing or on the picket line. There was still a strong case for the original plan of the Wagner Act; nevertheless, that policing of employees' activity in such cases was better left to the ordinary courts and state law-enforcement authorities than to the slow administrative process of a federal agency. * * *

"Employers pointed out more convincingly, however, that the Act prohibited interference by employers with the right of free choice by employees but did not specifically and effectively prevent such interference by unions, when, by boycott, strike, or other show or threat of economic power, they attempted to coerce employers to violate the Act. Some unions were so powerful that they could and sometimes did coerce employers, especially small employers, and their employees, by these methods rather than following the democratic process of organizing people and proving their right to recognition as majority representatives. This was an especially serious problem in some areas, as California, and with some unions, as the Teamsters * * * Here there was a strong case for an 'equalizing amendment.' * * *

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"Unions which had been in the habit of organizing from the top down, through the use of boycotts or picket lines, rather than organizing the people themselves, necessarily had to change their tactics; and this was a gain from the [Labor Management Relations] Act. Organization was made slower and more costly, but in these cases the interest of democratic self-organization was served by the necessity of following the methods which had always been intended by the Wagner Act." (at page 549)

(1) The intention to bar such economic coercion on the part of labor organizations was plainly expressed in the Senate Debate by Senator Taft, 93 Cong. Rec. 4022, 4023, 4024, who pointed out that unions as well as employers had vast economic power of holding a man's job in their hands and said:

"I cannot see any difference. If a man is invited to join a union its members ought to be able to persuade him to join, but if they should not be able to persuade him they should not be permitted to interfere with him, coerce him, and compel him to join the union. * * *

"The main threat was 'Unless you join our union, we will close down this plant, and you will not have a job.' That was the threat, and that is coercion--something they had no right to do. * * *

"We had a case last year where a union went to a plant in California and said, 'We want to organize your employees. Call them in and tell them to join our union.' The employers said, 'We

have not any control over our employees. We cannot tell them, under the National Labor Relations Act.' They said, 'If you don't, we will picket your plant'; and they did picket it, and closed it down for a couple of months."

(3) The intention to bar such collective organizational picketing, amounting in some cases also to a secondary boycott, was likewise expressed by Senator Ball in the debate, 83 Cong. Rec. 4917, who said:

"I have received a large number of letters calling attention to the type of threats and coercion by union organizers against which this particular amendment is aimed. One such letter is from an individual who operates a small sporting goods store in Salem, Oreg. He had only one employee. Both he and his employee were asked to join a union and threatened if they did not. They were told that they faced a secondary boycott, picket line, and so forth. * * *

"Another letter is from a coachman in the city of San Mateo, Calif., who apparently works in the Olsen Horse Saddle Shop, in San Francisco, where there are 11 employees who did not want to join the union. Nevertheless, the union, in an attempt to force them to join, picketed the establishment. * * *

"I have here a copy of the Daily Oklahoman * * * a local judge * * * found the Teamsters' * * * guilty of contempt of court for picketing an establishment although no members of the union were employed there, in an effort to coerce those

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who were employed there into joining a union which they did not want to join. " " "

"Finally, I have a story appearing in the New York Journal and American " " " telling about how the employees of food processors in Westchester County were being forced to join, against their wishes, a union as the price of keeping their job. In that case a strike line was thrown around the plant when the employees refused to join the union. " " "

(3) Senator Wheeler, another committee member, also attacked the National Fruit Board, by equalizing unreasonably economic conditions by unions, cited the California Cannery case of 1944, 85 Cong. Rec. 4152, and said:

"While the decision was pending, AFL leaders threatened to shut down the point of transporting produce from farm to cannery. This was done while the Board had before it the petition by the NLRB. The canneries became desperate. Vegetable and fruit was lying in the fields, a good deal of the crop going to waste, fruit growers' losses were heavy. In order to curtail losses, the canneries were forced to enter into a contract with the AFL. Such abuses must be ended. " " "

(4) In the 1947 Senate hearings (hereinafter so cited), 80th Congress, 1st Sess., hearings before the Senate Committee on Labor and Public Welfare on S. 55, etc., 988-990, Senator Ball, the committee chairman Senator Taft, and Senator Aiken, discussed such

economic coercion with William Green of the American Federation of Labor and we find the following:

"Senator Ball. * * * the teamsters * * * did not even bother to try to organize employees * * * they put a banner out in front of his shop and the teamsters refused to deliver or take away anything. Pretty soon the employer is facing bankruptcy, so he is compelled to sign a closed-shop contract and compel his employees, against their will, to join this union.

"Do you think that is sound union practice?

"Mr. Green. Well, you bring to me isolated cases.

"Senator Ball. That is not an isolated case. That is occurring in hundreds of situations today. * * *

"Mr. Green. It is practiced * * * by maybe one or two organizations out of the hundreds and hundreds affiliated with the American Federation of Labor. * * *

"The Chairman. We had detailed testimony of that all through last year * * * and this year, before this committee. The evidence is all here. * * * It happens all over the United States, you. * * *

"Senator Aiken. And I do believe that they are hurting all unions when they indulge in those practices.

"I have read the reports of the efforts made to force shopkeepers, particularly the butchers, to join the teamsters' union, and I have often

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...and they had for that. To ... if ... for more

...the ... the transfers

...to the De ... and finally the ... under the State

...pages 117- ... was apparently im ... of a ... Mr. Wilson, as fol

...in New Jersey an A. F. of L. ... the ... that he sign ... on the ... to discharge ... join the union with ... When the employer re ... a picket line made up of ... in front of his establishment.

"Some employers were courageous enough not to sign and were picketed, while others without consulting their employees paid the initiation fees for them and agreed with the A. F. of L. to discharge the employees who did not continue to pay dues."

"This un-American practice of organizing labor has been a blot on the entire labor movement. * * *

"The Chairman. You say 'recently in New Jersey.' Were these attacks directed at any of your unions?

"Mr. Wilkie. Yes, sir."

(6) In the 1947 Senate hearings, page 613, there was further testimony, under questioning by the chairman, Senator Taft, descriptive of such

"* * * lazy organizers who go out and organize a plant by going to the employer * * *

(7) There was impressive testimony on behalf of the American Trucking Association, in the 1947 Senate hearings, 381 H. concerning the use of truck transportation agencies as catapaws in such organizing from the top and the far-reaching effect of such activity against business dependent upon truck transportation and against nonunion interchange carriers, thus effectively interfering with the free flow of interstate commerce (at page 386). At page 385 we find the following:

"Senator Ball. It would appear, then, Mr. Rice, that there was no strike at these particular plants, but that the Teamsters were using the secondary boycott to try to force these employees into that particular union. Isn't that the situation?

"Mr. Rice. That is correct. The situation is that the motor carrier himself is not involved in any controversy with his own employees.

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"Senator Ball. It appears to me that if an employer is prohibited by law from compelling his employees to join a union, then the union should be prohibited from trying to force him to do that thing."

(8) During the 1947 Senate hearings, e.g. 936, 1497, 1861, 1938, Senator Ball repeatedly expressed, as in the Senate debates, the intention to get rid of such economic coercion, saying:

"We wanted to get rid of the secondary boycott which takes place when the union has its employees in the plant picketed, but simply establish a banner line and say it is unfair, then the teamsters refused to deliver. That is the method they are using in a good many cities to force organization." (at page 936)

"Well, there is a lot of difference between a picket line and merely an unfair banner line. The unfair banner line has been used to organize employees against their will to a tremendous extent in this country." (at page 1497)

"The worst cases I have heard of are those wherein unions do not even try to organize the employees. They go to the employer and demand that he sign a closed shop contract. He will not do it. They throw a banner picket line in front of his plant and then the teamsters boycott deliveries to and from the plant. That kind of boycott for most small employers who do not have much working capital will bankrupt them inside of 2 or 3 months." (at page 1938)

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(9) Similar testimony and informed judgment condemning organizing from the top appears in the 1947 House hearings before the Committee on Education and Labor, 80th Cong. 1st Sess., at page 107 where Honorable Howard W. Smith, alluding to hundreds of similar instances, presented to Chairman Hartley and the committee a small California restaurant man's

"* * * case history of a union's activity in its endeavor to pressure me into forcing my employees into the Culinary Workers' Union against their will."

(10) In the 1953 House hearings before the Committee on Education and Labor, 83rd Cong., 1st Sess., on matters relating to the Labor Management Relations Act of 1947, pages 1372, 1374, 1377, there is additional testimony, again from California, on behalf of some small bakeries that:

"What we object to is, instead of them selling themselves to the employees on the benefits they have to offer, the union wants to get its contract by what we call organizing at the top, namely, forcing the employer through economic pressure to sign the contract whether the employees want it or not. * * * (at page 1372)

"That is the only way they do operate that I know of in the teamsters. * * * the teamsters have got the weapon. * * * it is to stop transportation, and you will starve out the employer. * * * (at page 1376)

"* * * It is a standard method.

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"Now, some of them, where they cannot get what they want that way, will go ahead and organize the employees directly, but their first attempt always is to try to force the employer to sign up regardless. That is their easiest and cheapest way of operating. They have got the strength generally to do that with many employers."

(11) We must be content at this time to quote, from other illustrative material in the 1953 House hearings, *supra*, the following significant colloquy between Representative Wainwright of New York and C.I.O. General Counsel, Arthur J. Goldberg, at pages 2749-2750:

"Mr. Wainwright. Well, organizing from the top is your example of placing pickets outside of a nonunion seller of clothes. The union has not made the slightest attempt to go in and talk to any of those men. They have passed out no literature. Are you familiar with the Sears case, the attempt in New York to organize Sears?"

"Mr. Goldberg. I am not familiar with the Sears case, but I am very familiar with the Richmond case [see decision a few days earlier, April 14, 1953, in *The Richman Brothers Co. v. Amalgamated Clothing Workers, etc.*, 53 A.L.C. 831, 835], and in that instance the union is making a very vigorous attempt to organize employees at Richmond Clothing Co.

"Mr. Wainwright. Well, in the Sears case * * * Sears said they would not organize their

workers. * * * So they put four pickets outside the warehouse. Not one bit of clothing moved inside or outside of that warehouse. In other words, through the medium of just four pickets, the union was trying to force Sears, Roebuck to organize its thousands and thousands of employees; which would cost the union not one single cent. * * * Now, in other words, that type of conduct you feel is absolutely O.K. to enforce on management?

"Mr. Goldberg. I do not believe in organizing unions from the top.

"Mr. Wainwright. That is the point.

"Mr. Goldberg. I do not believe that organizing unions in that way makes for good unions. I don't believe it is a sensible, sound way, and I don't believe it is productive of good relationships or of good unions."

(12) In the 1953 Senate hearings (hereinafter so cited) 83rd Cong., 1st Sess., Senate hearings before the Committee on Labor and Public Welfare on Proposed Revision of the Labor Management Relations Act of 1947, at page 2335, a witness from Illinois testified that:

"The union tactic is * * * to throw stranger pickets around the plant at once. * * *

"The employer, of course, is faced with economic disaster unless he gives in and forces upon his employees a union which is not in fact or even pretense their true representative.

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"I have had three such cases in the last 6 or 7 months. Up to now I must say in fairness to the unions this practice has been confined to only one union, that is the teamsters union. * * *

"In one case, with which I am personally familiar, economics compelled the employer to give in and sell himself and his employees down the river."

(13) A witness from Texas, who elicited an interested question from the Chairman, Senator Táft, testified at the 1953 Senate hearings, supra, pages 921, 922, that:

"Prior to section 14(b) and the adoption of the Texas right to work statute, which was adopted by the 50th Texas Legislature in 1947, it was the common practice of many unions, even though they did not represent the majority of the employees at a particular place of business, or in many instances where they didn't represent any of them, to nevertheless picket such places of business for the purpose of compelling the employer * * * to compel such employees to become members of the union regardless of their voluntary choice or free will in the matter. That most typically and frequently occurred in the case of smaller business establishments * * *

"It is now possible, in Texas, as I note that it is in the other States having similar right to work statutes, to go into the State court and secure an injunction restraining picketing to compel the employer to require his employees to become mem-

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bers of the union, as such picketing would be picketing for an unlawful objective. * * *

"The Chairman. How long has your law been in effect?

"Mr. Jeffers. Since 1947, Mr. Chairman. Prior to that time the closed shop or the union shop was lawful under Texas law.

"Our Texas statute has been sustained as to constitutionality, as these other State right-to-work statutes have." [*Lincoln Federal Labor Union, etc. v. Northwestern Iron Co.*, 335 U.S. 525]

(14) Senator Taft displayed deep interest in the catspaw plight of trucking

"* * * the most potent secondary boycott weapon known"

forcefully presented in the testimony, 1953 Senate hearings, supra, page 733, 742, and statement, 743, 744, of a representative of American Trucking Association as this witness stated,

"Teamsters' General President Dave Beck recently stated that plans have been laid to bring his organization's membership up to 3 million within the next decade.

"Motor truck operators who are told by the teamsters to stop picking up or delivering freight, to an establishment designated 'unfair' by the union, under threat of having their 'barn' shut down, usually do so. * * *

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"With the vastness of our industry and with the high degree of organization of for-hire motor carriers by the teamsters—the United States Labor Department reports them to be 90 percent organized—one cannot help but be impressed by the awesome prospects of the potential secondary boycott this combination of circumstances affords. Cutting across every line of freight communication in manufacturing, processing, distribution, and retail industries, trucking presents to unions an ideal weapon to effectuate and enforce secondary boycotts."

We find the following pertinent colloquy at page 739 between the trucking representative, Benjamin R. Miller, and Senator Taft:

"Senator Taft. We have had a lot of cases where the truckers were forcing employers to require their employees to be organized, or to join the trucking union, although they were warehouse employees or otherwise.

"Mr. Miller. That is correct, Senator Taft.

"Senator Taft. The act attempted to stop that."

(15) Senator Taft, in discussing with C.I.O. General Counsel, Arthur J. Goldberg, the "law of the jungle" that preceded the National Labor Relations Act, and the contrary policy adopted by Congress of "holding everybody to fair dealing" stated, in the 1953 Senate hearing, *supra*, at page 583, that:

"* * * today if you want to organize a plant you have a method of going in and persuading

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the employees that there ought to be a union. If you cannot persuade them, then there ought not to be a union and there ought not to be any indirect pressure on their products and their work to make them unionized."

In short, informed opinion supports the wisdom of Congress in buttressing the important employee-free-choice state policy here applied by a state court in adjudicating the private right of an employer to be free from the harm inflicted by this roundly-outlawed tortious organizing from the top.